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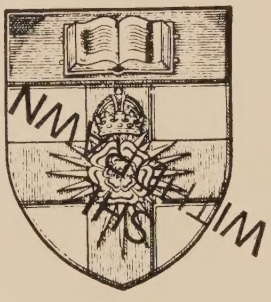

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Editorial communications should be addressed to:

THE SECRETARY,
THE BRITISH YEAR BOOK OF INTERNATIONAL LAW,
THE ROYAL INSTITUTE OF INTERNATIONAL AFFAIRS,
CHATHAM HOUSE,
10 ST. JAMES'S SQUARE, S.W.1.

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LEIBNIZ AS INTERNATIONAL LAWYER

By J. WALTER JONES

Fellow of Queen's College, Oxford

In 1646, the year after the death of Grotius, Gottfried Wilhelm Leibniz was born. He entered the University of Leipzig as a law student at the age of fifteen, but did not begin the study of law until he had given two years to other subjects, particularly philosophy. Then for three years, from 1663 to 1666, he immersed himself in the law. Apparently he met with few difficulties. Legal theory, he says, came easily to one already versed in history and philosophy, and "not setting a high value on that which cost me so little trouble to understand, I immediately entered on the study of the practical part of my profession".[1] But he had already written some essays on legal subjects when in 1666 he applied for his doctor's degree. He admits that his aim was primarily to obtain admission as soon as possible to the faculty at Leipzig. The members of the faculty were practitioners rather than teachers, and admission was strictly by rotation from among the doctors in order of seniority. Thus the sooner Leibniz took his degree the sooner he would become an assessor, and, as he says, be in a fair way to make his fortune. Knowing this, the faculty thought that Leibniz should give way to candidates who were more mature in years, and his application was rejected.[2] He then decided to leave his native town, and was granted the degree of doctor at the University of Altdorf, within the jurisdiction of the imperial city of Nuremberg. On the journey, and when out of reach of books, he wrote his treatise *A New Method of Teaching and Learning Jurisprudence*, which, as Christian Wolff, one of his best-known philosophical disciples, later remarked, is surprisingly acute and mature for an author who was only just twenty-one years of age.[3]

The book was symptomatic of the perplexity into which thoughtful lawyers were thrown as they looked at the condition of the law and of legal study at this time, when the process of the Reception of the Roman law into Germany was almost complete. What was received was not the law of the texts of Justinian but the system—if system it could be called—which had been constructed upon them by the Italian commentators since the fourteenth century, and which, diverging as it often did from the pure word of the *Corpus Iuris*, was at least infinitely better suited to the conditions of medieval Germany. On the other hand, the influence of the new learning, with its emphasis on the importance of a true understanding of the ancient texts, gradually spreading in the course of the sixteenth century from its starting-point at Bourges to most of the universities of Germany, was producing a deep dissatisfaction with the mechanical methods in vogue in

[1] Mackie, *Life of Leibniz*, pp. 31–2.

[2] Another account of the incident puts a more personal complexion upon it. "Nempe cum in aedibus decani consilii sui indicium ex more facere vellet, ab uxore eius, adolescentiam illius contemnente, repulsam passus dicitur". See the life prefixed to *Opera*, ed. Dutens (1768), i, p. lxiv, also the *Eloge*, *ibid.*, p. xxviii: "Cette même jeunesse lui avait peut-être attiré la mauvaise humeur de la femme du Doyen".

[3] Wolff's *Praefatio* to the *Nova Methodus discendae docendaeque Iurisprudentiae.*

the courts. It was felt that if the law was to become a coherent body of rules, the methods of the schools ought to be applied to the subject-matter of the practitioners, so that the civil law might be cleared of the charge, later directed against the common law in England, that it might be learned but could not be taught.

In the seventeenth century, therefore, more than one writer set out to demonstrate what he conceived to be the true method of legal science. Among the contributions was the *Nova Methodus* of Leibniz, and his aim is clear from the inclusion of *docendae* as well as *discendae* in the title. His early training in logic and mathematics had led him in 1665 to look at the law as illustrating the method of logical deduction of rules from a number of general propositions, and to regard the legal process as capable of a precision similar to that of a mathematical demonstration.[1] The medieval jurists seemed to him to have completely ignored the possibility of arranging the law in some ordered system.[2] Although he agreed with those who were asserting that great benefits could be derived from interpreting the texts and treating legal rules in the light of their history, in this respect having some claim to be regarded as a precursor of the later school of Savigny and Maine, he was on the whole satisfied with the content of the law as it stood. What was necessary, he thought, was that it should be put into more accessible and manageable form. He had no sympathy with those who urged a return to the old German customary law; he agreed with the Romanists who said that to do this would be like continuing to live on acorns after men had learned how to produce the fruits of the field.[3]

Leibniz proposed as a first step that the *responsa* of the Roman jurists should be arranged in a series of clear and, so to speak, mathematical propositions to form a book which could be used as a guide and supplement to the Roman texts. Then a commission should be set up to collect the leading passages in the commentaries of the civilians most in use in the courts. When this collection had been made, he was sanguine enough to think that no one in future would add to the mass of the existing literature unless he had something new to say.[4] And, to bridge the gap between the schools and the courts, the student's second year in the university was to be given to a more practical scheme of study than that in use, which would include the discussion of legal questions from the standpoint of the advocate rather than of the judge. These proposals brought Leibniz to the notice of the Elector of Mainz, who appointed him to assist in a scheme of legal reform which was in progress there, and he seems to have made a start at rendering the law more "cognoscible".[5] Nothing much, however, came of this project, and such revision and codification of the various systems of law in force

[1] See the *Specimen Certitudinis seu Demonstrationum in Iure Exhibitum in Doctrina Conditionum*, *Opera*, iv, pt. 3, p. 93.

[2] The medieval jurists, he says, had worked in a dream, being content to overwhelm laws with glosses and judges with opinions, p. 183.

[3] Letter to Kestner, *ibid.*, p. 253. This proverbial saying was already ancient when Cicero, *Orator*, 30, borrowed it from the Greeks and applied it to oratory: Quae est autem in hominibus tanta perversitas, ut inventis frugibus glande vescantur.

[4] The proposal for a *Syntagma* or *Pandectae ex locis communibus* was sketched in the *Nova Methodus*, pp. 222–4. The *Corpus Iuris Reconcinnatum* was the subject of a special pamphlet, *ibid.*, pp. 235–52.

[5] Schrecker, *Lettres et Fragments inédits* (1934, Introd., p. 25), calls the *Nova Methodus* "le livre par lequel il posait, pour ainsi dire, sa candidature".

in Germany as were accomplished during that century, as well as the next, were little, if at all, influenced by his proposals.

Of more direct interest to international lawyers is the long Tract on Sovereignty which Leibniz published in 1677, under the name of Caesarinus Furstenerius.[1] He had entered the service of the Duke of Brunswick the year before at Hanover. The Duke had not yet attained the rank of an Elector, and at the opening of the negotiations which ended in the Treaty of Nijmegen, 1679, there had been much dispute as to the ceremonial honours and precedence to be shown to those free princes of Germany who were not Electors and who complained that their representatives were accorded a lower place than those of such Italian rulers as the dukes of Modena and Mantua. The aim of Leibniz was to make good the claim of the German princes to the same standing as that of Electors, Kings, and the Italian Dukes. His pseudonym was meant to indicate that his contentions for his master were not to be taken as diminishing in any way the prerogatives of the Emperor. Though this tract also failed in its immediate object,[2] it made a notable contribution to the subject of the nature and content of the concept of sovereignty—a problem which has occupied jurists and statesmen ever since the modern state began to make its appearance.

Leibniz's approach to the question is a frankly realistic one. For the works already written *de Civitate, de Maiestate, de formis Rerum publicarum* he expresses the utmost contempt. What was the use of trying to bring the confused conditions, resulting from the decay of the Empire and the break-up of the feudal system, within the framework of Roman texts which assumed that the Emperor was lord of the world ? To lump together all other princes as standing in the same position as provincial governors in the old Roman Empire was to ignore the forces at work in the new age. Perhaps such conclusions were only to be expected from writers who had little thought for practical affairs, at any rate for those outside the courts. What surprised Leibniz still more was that men occupying high position in public life, when they came to put pen to paper, made a show of useless erudition instead of giving the fruits of their experience. They seemed to think that no precedent was of value which was not confirmed by some Greek or Roman poet or orator. Their neglect of recent instances and documents made their effusions valueless to practical men. But here, as elsewhere, he is at pains to make an exception of Grotius for selecting his authorities from modern as well as ancient times and always with an eye to their relevance to the conditions of his day. He could only wish that Grotius had now and then put aside his unparalleled store of learning and turned to such matters as titles and ceremonies and the practices relating to them; for, insignificant as they might seem to scholars, they were a source of continual perplexity in practice.[3] Such minutiae might not bring fame to authors, but they filled a need not provided for by elegance of style or facility of aphorism. He confesses that he had not infrequently found what he wanted in some handbook despised by the writers whose tomes filled the libraries.

[1] *Tractatus de Iure Suprematus ac Legationum Principum Germaniae*, in Dutens, iv, Pt. 3, pp. 329–496, and Klopp's ed. of the Works, iv, pp. 21–315.

[2] Hanover became an Electorate in 1692.

[3] *Tractatus* (Klopp), pp. 49–50.

Was the problem of international status a legal or a political one? In the seventeenth century progress in establishing some sort of rule of international conduct depended upon the success with which public questions could be settled within the framework of the private, i.e. Roman, law. Leibniz distinguishes the function of the lawyer and the statesman. The former is bound by precedent; the latter will keep in mind not only what has been done in the past but also what ought to be done in the future. Leibniz is quite ready to defend his position on legal lines. In law the Italian princes were no less subject to the Emperor than those of Germany. On the other hand, he does not feel called to discuss the effects of the Emperor's actual absence from Italy, because his main concern is with law and not with expediency, with titles and not with policy. But law in itself is not enough. After all, there is a law of nature, by which all men are free and equally bound to do justice; and when we look at the facts, on the other hand, what difference can we see between a tyrant or a bandit leader and a king? The only safe course then, says Leibniz, is to temper law with fact, and to take a middle course between jurisprudence and political theory.

Bodin had followed much the same plan, and Leibniz's doctrine is essentially that of Bodin. There is the same insistence that *Suprematus* is something more than *Superioritas*, more than the power to make laws and settle disputes for the ruler's subjects, more even than the power to punish them if they are refractory. It implies external independence, and this may exist in fact even while there is *de iure* dependence on the Empire. Sovereignty is international personality, consisting of such rights as to send diplomatic envoys or to make war and peace and treaties. But Leibniz lays more stress upon the actual military force at the disposal of the Prince than does Bodin, who, after some hesitation, had concluded by denying sovereignty to the princes of Germany. To Leibniz the test is: Has the prince command of enough force to intervene with effect in foreign affairs when his interests demand it, i.e. more than is enough merely to keep his subjects in submission—*mera facultas cogendi sive coercendi*—which indeed usually requires no compulsion at all, for (as Maine was to say later) their loyalty depends for the most part upon custom, tradition, and education? A sovereign in international law is a ruler whose armed strength counts in international relations, and who cannot be compelled to adopt any course of conduct except by measures amounting to war.[1] Thus, although Leibniz rejects force as the criterion of internal sovereignty, he accepts it as decisive in the international sphere.

Much of this, of course, had been said before. The influence of earlier writers, particularly Bodin, Bacon, Grotius, and Hobbes, as well as the civilians, is apparent in all the legal and political writings of Leibniz. But he was not the man to follow anyone slavishly and he was always ready to confront a theory with a fact. Thus he has some acute criticisms to make of the dogma of the indivisibility of sovereignty, as he found it in Bodin and Hobbes. Even if it were true that law received its binding force from the sovereign, there was no reason why the exercise of sovereign power might

[1] *Tractatus* (Klopp), pp. 13, 143; cf. *Opuscula, ibid.*, p. 341. It followed that the extent of the territory might be too small to qualify its ruler for sovereignty. The King of the Isle of Man therefore was not sovereign.

not be shared by several persons in varying proportions. Poland and Belgium provided him with contemporary instances. In more recent days Austin's defence of the dogma has not appeared very convincing even to his followers, who have tried to meet the difficulties raised by modern federal states by the device of vesting sovereignty in the State as an abstract entity rather than in some person or body within the State. But Leibniz makes the matter simply one of convenience, and what he says of Hobbes's general approach to political and legal philosophy shows how far he was from those theorists who cling to *a priori* assumptions in the face of historical facts. No doubt, he says, divided powers bring with them many inconveniences, sometimes even wars. But experience proves that men generally seek a middle course and do not press their pretensions to the point of using force. It was only writers like Hobbes who failed to distinguish between the inconvenient and the intolerable. However awkward division of sovereign powers may be, it exists, says Leibniz. The State, as conceived by Hobbes, on the other hand, does not exist outside his imagination; it has never been seen among civilized or barbarous peoples. Indeed such a state is not only impossible, but undesirable. If the powers of sovereignty are not to be divided among several men, then God alone is fit to possess them.[1]

So much for the facts. Leibniz saw that any system of international law must start from a clear appreciation of practical realities. But, as a lawyer, he felt the need of translating the facts of armed power into some sort of legal formula; they must be made to serve as a foundation for a legal construction analogous to that which was involved in legal concepts in general. To him, as to Bodin, sovereignty represented more than a bundle of facts demanding the attention of statesmen; it was a legal quality inherent in the State as the subject of international rights and duties, and therefore susceptible of legal analysis. He cites with approval the dictum of the great civilian Baldus that superior force is as natural to a state as mist to a marsh. Legally he puts sovereignty on the same footing as the notion of *dominium* in the civil law. It is a sort of compound legal entity or *universitas iuris* (*universitas quasi quaedam*), a residuary right from which minor powers may be subtracted by grant or prescription or other divesting act without necessarily transforming its essential character. And just as ownership of a chattel may be transferred by delivery or judicial decision, so may sovereignty be lost by war, though not by non-use of armed power, for when once the title has been acquired, it can be retained by mere repute—*sola hominum opinione: id est, obsequio, cultu.*[2] Moreover a state is itself a juristic person, the difference between a confederation and a union being analogous to that between a partnership and a corporation, the latter being a new civil person with rights distinct from those of its members. Thus he denies sovereignty to the free cities of Germany, not because they are subject to the Empire, but because, taken individually, they do not exert enough influence on external affairs, keeping their forces within their walls,

[1] *Tractatus, ibid.*, pp. 61–2; cf. Hartmann, *Leibniz als Jurist und Rechtsphilosoph* (1892), pp. 61 *et seq.*

[2] For *actiones* in the usual division of the branches of the law Leibniz substitutes *actus*, among which is *bellum* as a mode of recovering sovereignty recognized by international law, though possibly contrary to justice. Sovereignty, like ownership, may be legally vested in one who unjustly assumes it.

and making no claim to international status; taken together, they do not set up a common administration, with authority over the members.[1]

In his discussion of the position of diplomatic representatives Leibniz refers to several international controversies of the seventeenth century.[2] Distinguishing an envoy from a secret agent as being sent on a public mission, with letters of credence, he starts from the general principle of diplomatic inviolability as well established by both the law of nations and natural reason. A negotiator's immunity should not be violated on any pretext, and even an envoy sent by rebels to discuss terms with their prince should be unmolested even though no safe-conduct has been promised. Therefore the seizure by Phillip II of Spain of the representatives of his rebellious subjects in the Netherlands was to be condemned. The envoy's property should not be seized for debt nor his person on a criminal charge, for to permit this would open a wide road to the utter disregard of diplomatic immunities. On the other hand, steps may be taken to prevent an envoy doing any harm to the State to which he is accredited, and if there is reason to believe that his continued presence may prejudice its dignity or security, he may be conducted to the frontier as was done to the papal nuncio by Louis XIV in the affair of the Duc de Créqui, who was roughly treated while acting as French ambassador in Rome. As for the suite and staff of the envoy, jurisdiction should in general be left to their master. Thus, when in 1605 Bruneau, the secretary to the Spanish ambassador in Paris, was found to be implicated in a plot against France, Henry IV was right in delivering him up to the ambassador, despite the clamour of some members of the Parlement of Paris who demanded his trial as a traitor. The King acted not so much from motives of generosity as from regard for legal principle.[3] Cromwell, on the other hand, says Leibniz, only displayed "his usual violence or hypocrisy" in allowing the execution of Don Pantaleo de Sá, brother of the Portuguese ambassador, for murder. In his anxiety to please the populace the Protector had been guilty of a clear breach of international law.[4] It followed, so Leibniz held—contrary to the view of Grotius and the general opinion of later writers—that the envoy must be conceded jurisdiction to punish the wrongdoer himself without sending him home.[5] The monarch clearly has no less power than his envoy, so that Queen Christina of Sweden was well within her rights in ordering the execution of her equerry, Monaldeschi, in France in 1657.[6]

The seventeenth century was the hey-day of the school of natural law.

[1] Scotland, on the other hand, is as much a sovereign state as France or England and it makes no difference "quod eundem cum Anglia Regem habet, et quod Rex in Anglia degere mavult".

[2] Grotius had pointed out the part played in this branch of international law by "voluntary" practice. "Ius hoc non ut ius naturale ex certis rationibus certo oritur, sed ex voluntate gentium modum accepit". *De iure Belli ac Pacis*, II, xviii, 4.

[3] Cf. Adair, *The Exterritoriality of Ambassadors in the Sixteenth and Seventeenth Centuries*, p. 133. Bruneau was released only after all the information he could give had been extracted from him.

[4] Adair, *op. cit.*, p. 153, also concludes that "the attitude of the authorities was largely determined by the need for popular approval". The question of the position of the members of the envoy's family does not seem to have been seriously raised.

[5] Cf. Grotius, *op. cit.*, II, xviii, 8: "Ipse autem legatus an iurisdictionem habeat in familiam suam . . . ex concessione pendet. Illud enim iuris gentium non est". Adair, *op. cit.*, pp. 167–8.

[6] Leibniz does not mention the fact that Queen Christina had abdicated in 1654.

Leibniz, like most other thinkers, believed in the existence of a body of principles of justice, which were not merely ethical but in some sense legal as well, and which were none the less independent of human enactment. But he inclined to the teaching of Grotius rather than of Hobbes and Pufendorf, and his references to the views of Grotius on the meaning and origin of this law of nature are consistently respectful and approving. On the two main points where Grotius departed from the traditional teaching, Leibniz followed Grotius. One of the best-known passages in Grotius is that in which he says that there would be a law of nature, inseparable from the existence of any ordered human society, even if it were assumed that there was no God or that He took no interest in human affairs.[1] Leibniz defended this position against Pufendorf, who reasserted the old view that the law of nature derived its binding force from the divine will and command, and not from the intrinsic quality of the rules themselves. As a mathematician, Leibniz believed that the truths of mathematics were founded on eternal reason, i.e. on something more stable than any will, even divine will. In the same way, the principles of natural law were the principles of justice, and, like mathematical truth, justice was something inherent in them rather than coming to them from without.[2] As to human nature, he was tempted by the devastation caused by the wars of Louis XIV to believe that man was never so ingenious as when devising means of mischief, and his *Epigramma in Bombos* gave expression to this pessimistic outlook on the future of the race.[3] But, on the whole, he was with Grotius in holding that man was essentially a social animal, as against Hobbes's picture of a state of nature which was a war of all against all. Recently published accounts of life among the Iroquois and Hurons—names which to us of a later day conjure up scenes of lawless brutality—seemed to him to have disproved the political teaching of Hobbes, for though the North American races were in a real state of nature, so far was it from being true that each man's hand was against the other's, that whole peoples were to be found without courts and without quarrels.[4] From this he could only infer that it was not sheer necessity, rooted in the inherent badness or even the inherent goodness of men, which is at the root of civil society, but an inclination of men towards improving their lot and towards "the pursuit of happiness", for which admittedly security was an indispensable condition. The remark of Machiavelli that in bulk men are neither very good nor very bad commended itself to Leibniz, who took the realistic view that extremes of virtue and vice are equally rare.

Of more practical moment, and perhaps the most far-reaching of the Grotian doctrines in the field of international law, was the distinction drawn

[1] *Op. cit., Proleg.*, II.

[2] "Uti atheus potest esse Geometra, ita atheus Iureconsultus esse . . . Uti proportionum et aequalitatum, ita et aequitatis et convenientiae regulae aeternis rationibus constant", *Tractatus*, p. 273. How far Leibniz was from being a mere legalist may be seen from his definition of a right as *quaedam potentia moralis*, and a duty as *necessitas moralis* (p. 294). The maxim *ne quis re sua male utatur* seemed to him to apply in the civil and still more in international law (p. 297). Justice he defines as *nihil aliud quam charitas sapientis* (p. 313); cf. Schrecker, *Leibniz, Ses Idées sur l'Organisation des relations internationales* (1937), pp. 13 *sq.*

[3] *Works* (Klopp), v, p. 638. With their references to *tormenta, balista, cuniculi, disjectae domus*, etc., these verses have not lost their aptness in the course of time.

[4] *Jugement sur les Oeuvres de M. le Comte de Shaftesbury* (Dutens, v, pp. 46). Montaigne had painted an equally idyllic if more satirical picture of the "Cannibals" of Brazil.

between the natural and the voluntary law of nations—*quod gentium omnium aut multarum voluntate vim obligandi accepit.*[1] This notion of the consent of nations as productive of international rules had been rejected by Pufendorf as inconsistent with the conception of law as a command. To Leibniz, as to Grotius, the rules arising from *consensus* and *usus*—regarded as a tacit agreement—though possibly ultimately founded on a natural law principle of *stare pactis*, were worthy of separate discussion; and this recognition of the positive element in international law, in later days pushed to extreme lengths, opened the way to giving its rules a firm basis in established usage, although as with the social contract theory of the binding force of state law, the agreement to be bound was more a hypothesis than a fact. To Leibniz, as to others of his time, the link between the natural and voluntary law of nations was found in the Roman private law which occupied the place of a sort of *ius gentium commune*, both as the nearest approach to written reason in the sphere of law and as a survival from the Empire of ancient Rome to which all the Christian states of Europe had been subject. Even the English, he says, who follow their own law at home, adhere to the Roman law in their dealings with foreign states.[2] As for Pufendorf, Leibniz had no very high opinion of him as a thinker. He describes him as not much of a jurist, and still less of a philosopher.[3]

Leibniz's verses *in bombos* were written in 1689 when many men of feeling were aghast at the destructiveness of aggressive wars. In his tract *Consilium Aegyptiacum*, written in 1672, he had tried to deflect the ambitions of Louis XIV from Europe by urging him to found a real Empire in the East by an easy conquest of Egypt, instead of laying Europe waste in the pursuit of an empty chimera.[4] Louis, however, preferred to wage his wars nearer home, and in 1683 Leibniz wrote his essay *Mars Christianissimus*,[5] a piece of raillery aimed at the ideological pretensions which Louis, like more recent would-be conquerors of Europe, felt it expedient to put forward, or to allow others to put forward on his behalf, in order to give a semblance of idealism to the more material arguments of his armed forces.

Leibniz had resided in Paris for four years from 1672, and the anonymous author describes himself as a German who has always been a warm admirer of the French genius. He addresses himself to those "misguided" people who, while seeing that the safety of the Church depended on the greatness of France, could not bring themselves to forget their loyalty to their own rulers and people in the interests of Christianity as a whole. Then follows a sketch of a "new Jurisprudence" which claims to have the support of the casuists and moralists, especially those Jesuits "who have come to expect more from the French than from the Spanish monarchy", while against it

[1] *Op. cit.*, i, 14 (1).

[2] *Codicis iuris gentium diplomatici praefatio, Works* (Klopp), vi, p. 476.

[3] Letter to Kestner, p. 261; *parum Iurisconsultus et minime Philosophus.*

[4] "Leibniz could scarcely have anticipated that a school of historians should spring up two centuries after his project of an expedition to Egypt had been rejected by Louis XIV, and would contend that it had been studied and approved by one of the greatest captains of his age, and that General Bonaparte, in his expedition to Egypt in 1797, did little more than carry into execution the design which Leibniz had in vain recommended to the most ambitious of the Bourbon Kings"; Twiss, *Leibniz's Memoir upon Egypt*, reprinted from *Law Magazine and Review*, May, 1883.

[5] Klopp, v, pp. 203–43. It was written first in Latin and then translated by Leibniz himself into French.

are ranged only the German jurists and the Italian canonists. It consists simply in the doctrine of the divine right, not of kings in general, but of "the grand Monarch", Louis XIV. Whatever is said of the divine Empire on Earth can be adduced in favour of the Empire of Louis. Indeed, it has long been settled doctrine in France that God, i.e. the sword, is the only final judge, for victory in battle is a divine judgment. Then there is the saying of St. Paul that the just man knows no law. Who then is the just man? Was not the answer long ago put into the mouth of Thrasymachus by Plato that justice is simply whatever is to the advantage of the stronger?[1] That Louis has received from Heaven a power not subject to the obligations imposed on ordinary men is borne out by the fact that he can perform miracles. It is undoubtedly a miracle that a king with so many wars on his hands is never short of money. Since there is no other king who has so clear a vocation for the reformation of the temporal affairs of Christendom, it follows that in conscience all kings are bound to obey him as the arbiter of Europe. If it is asked why Louis does not begin his crusade with the conquest of the Turks, the answer is that it is not the Turks but the Germans and Flemings who touch the borders of France, and we must deal with those nearest us before passing to the more remote. In Germany the Catholics must recognize Louis as a champion whose armies fight for religion and not for aggrandizement.[2] As for the English, they will have to suffer for their heresy and for the infamous crime of regicide which their dissensions have led them to commit.[3]

It was characteristic of Leibniz that, having taken a stand for custom and treaties as sources of international law, he should feel the practical need for making knowledge of them more accessible to statesmen and students. Consequently, out of the material not used for his history of the House of Brunswick, upon which he was engaged in his capacity of court historiographer, he published a *Codex Iuris Gentium Diplomatici* (1693) with a later supplement, the *Mantissa Codicis Iuris Gentium Diplomatici* (1700). These served as a model for Rymer's *Foedera*, the appearance of which in 1704 Leibniz welcomed very warmly as an improvement on his own work. Containing, as it did, a heterogeneous mass of royal marriage contracts, declarations of war, general manifestoes, treaties of peace and truces, the *Codex* showed the poverty rather than the wealth of the documentary sources of international law. But, as Leibniz pointed out, if the material was scanty, it was all there was; and in such documents alone was it possible to trace the history of the legal regulation of the conduct of states and princes. Moreover, such works might bring home to statesmen their responsibility for a state of affairs represented by a succession of treaties of peace between

[1] "Justum est potentiori utile"; cf. Plato's *Republic*, 338 C, and Grotius, *op. cit.*, *Proleg.*, 19.

[2] "Les armes de France sont destinées plutost à l'accroissement de la Religion que de la Région", a sly reference to the compromise which marked the end of the wars of religion in Germany: *Cuius regio eius religio*. The old fear of Imperial, in practice German, designs on France had led to the continuance of the ban on the teaching of the civil law in the University of Paris, originally imposed by Pope Honorius III in 1219. In 1679 the prohibition, which did not apply outside Paris, was abrogated by Louis XIV, at a time when the German menace had disappeared and it was France which was threatening Germany. See Déclareuil, *Histoire générale du Droit français*, pp. 431 *sq.*

[3] Cf. at p. 232; "On croit que les François ont fomenté les dissensions de l'Angleterre, et qu'ils ne sont pas tout à fait innocens de l'infâme parricide qui s'en est suivi".

the same nations, and the ironical truth of the story of the Dutch merchant who, having chosen "Perpetual Peace" as the title for a picture, found he had commissioned the painting of a graveyard.[1]

Leibniz has been described as "the greatest polymath since Aristotle", and as "the most universal genius of the Newtonian age".[2] "Like Locke, he was a politician, a pamphleteer, a philosopher, a theologian. He was also an eminent historian, and a mathematician of very high rank".[3] Moreover, he had received the training in the law which Locke recommended for others, but had not received himself. He was profoundly concerned about the state of legal learning and of the law, both national and international, of his day. He had taken all knowledge for his province, and it cannot be said of him, as it has been said, however jestingly, of Cicero and Lord Brougham, that if he had known a little law he would have known a little of everything. He knew much of most things, and not least of law.

[1] Cf. the opening paragraphs of Kant's *Zum ewigen Frieden.*
[2] Taylor, *Philosophical Studies,* p. 262.
[3] Clark, *The Seventeenth Century,* p. 264.

SOME CONSTITUTIONAL PROBLEMS OF INTERNATIONAL ORGANIZATIONS

By C. WILFRED JENKS

Legal Adviser of the International Labour Office

1. In the scheme of world organization contemplated by the Charter of the United Nations[1] the constitutions of the specialized agencies will be hardly less important than the Charter itself for the future development of an effective world order. A comparative study of some of the problems which have arisen in framing and working the constitutions of these agencies, and are likely to require consideration again as further instruments are framed and put into operation, may therefore be of more than transitory interest, if only as a demonstration that international lawyers must now be prepared to recognize as one of the major divisions of their subject the comparative law of the constitutions of international organizations.

2. There is now a considerable body of experience on which to base such a comparative study. The inter-war experience of the League of Nations, the International Labour Organization and the Permanent Court of International Justice, and of such bodies as the International Commission for Air Navigation, the League narcotic control agencies and the intergovernmental commodity control authorities, the still longer experience of the older public international unions, and that of the inter-American experiment in international organization on a regional basis, have now been supplemented by the experience of a period of intensive constitution-making under the leadership of the United Nations. A United Nations Relief and Rehabilitation Administration has been established to provide aid and relief for the populations of liberated areas.[2] The United Nations Conference on Food and Agriculture at Hot Springs, Va., has resulted in the establishment of

[1] Concerning the Charter and the discussions preceding the signature of the Charter see: *Charter of the United Nations*, Report to the President on the Results of the San Francisco Conference by the Chairman of the United States Delegation, the Secretary of State, 26 June 1945, Department of State, Publication 2349, Conference Series 71; *A Commentary on the Charter of the United Nations signed at San Francisco on the 26th June*, 1945, London, His Majesty's Stationery Office, Cmd. 6666 of 1945; *Report on the United Nations Conference on International Organization, held at San Francisco, 25th April–26th June*, 1945, Department of External Affairs (Canada), Conference Series, 1945, No. 2, Ottawa, King's Printer, 1945; *United Nations Conference on International Organization, held at San Francisco, U.S.A., from 25th April to 26th June* 1945, Report by the Australian Delegates, Commonwealth Government Printer, Canberra, 1945; *Report by the Executive Committee to the Preparatory Commission of the United Nations*, 1945; *Report of the Preparatory Commission of the United Nations*, 1945.

[2] Agreement for United Nations Relief and Rehabilitation Administration, Washington, 9th November 1943, Cmd. 6491 of 1943; United Nations Relief and Rehabilitation Administration, Resolutions and Reports adopted by the Council at its First Session, held at Atlantic City, New Jersey, U.S.A., 10 November to 1 December 1943, Cmd. 6497 of 1943; United Nations Relief and Rehabilitation Administration, Report of the Director General to the Second Session of the Council, September 1944, Council II, Document 1; United Nations Relief and Rehabilitation Administration, Resolutions on Policy, Second Session of the Council, September 1944; *UNRRA: Gateway to Recovery*, National Planning Association, Washington, 1944; Philip C. Jessup, "UNRRA, Sample of World Organisation", in *Foreign Affairs*, Vol. 22, No. 3, April 1944, pp. 362–73.

a Food and Agriculture Organization of the United Nations,[1] designed to promote long-term action for the purposes of raising levels of nutrition and standards of living, securing improvements in the efficiency of the production and distribution of all food and agricultural products, bettering the condition of rural populations, and thus contributing towards an expanding world economy.[2] The United Nations Monetary and Financial Conference at Bretton Woods, N.H., has framed Articles of Agreement for the constitution of an International Monetary Fund and of an International Bank for Reconstruction and Development, which have been submitted to governments for their approval.[3] The Fund is designed to promote international monetary co-operation through a permanent institution which provides the machinery for consultation and collaboration on international monetary problems, and its specific purposes include the promotion of exchange stability, the maintenance of orderly exchange arrangements among members, and the avoidance of competitive exchange depreciation.[4] The Bank is to assist in the reconstruction and development of the territories of its members by facilitating the investment of capital for productive purposes; it is to promote foreign investment by means of guarantees or participations in loans and other investments made by private investors, and, when capital is not available on reasonable terms, to supplement private investment by providing, on suitable conditions, finance for productive purposes out of its own capital, funds raised by it and its other resources.[5] The International Civil Aviation Conference at Chicago, Ill., has drafted an international civil aviation convention, which is designed to supersede the Paris Convention of 1919 and the Havana Convention of 1928 and provides for the establishment of an International Civil Aviation Organization.[6] By an International

[1] *First Report to the Governments of the United Nations by the Interim Commission on Food and Agriculture*, Washington, 1 August 1944; published in the United Kingdom as *Documents relating to the Food and Agriculture Organisation of the United Nations*, 15 August–14 December 1944, Cmd. 6590 of 1945. For background studies of the problems confronting the F.A.O. see Karl Brandt, *The Reconstruction of World Agriculture*, New York, 1945, Theodore W. Schultz (ed.), *Food for the World*, University of Chicago Press, 1945, and P. Lamartine Yates and Doreen Warriner, *Food and Farming in Post-War Europe*, London, 1943. Cf. also International Labour Office, Studies and Reports, Series K, No. 14, *Social Problems in Agriculture*, Geneva, 1938. The first F.A.O. Conference was held at Quebec in October 1945. [2] Preamble.

[3] *United Nations Monetary and Financial Conference*, Bretton Woods, New Hampshire, *U.S.A.*, 1 *July* to 22 *July* 1944, *Final Act*, Cmd. 6546 of 1944; published in the United States as *United Nations Monetary and Financial Conference, Bretton Woods, New Hampshire, July* 1 *to July* 22, 1944, *Final Act and Related Documents*, Department of State Publication 2187, Conference Series 55. See also George N. Halm, *International Monetary Co-operation*, Chapel Hill, N.C., 1945; Alvin H. Hansen, *America's Role in the World Economy*, New York, 1944; *International Financial Stabilisation: A Symposium*, Irving Trust Co., New York, 1944; Louis Rasminsky, "International Credit and Currency Plans" in *Foreign Affairs*, vol. 22, No. 4, July 1944, pp. 589–604; John H. Williams, *Post-war Monetary Plans*, New York, 1944, and "International Monetary Plans: After Bretton Woods" in *Foreign Affairs*, vol. 23, No. 1, October 1944, pp. 38–56; Henry Morgenthau, "Bretton Woods and International Co-operation" in *Foreign Affairs*, vol. 23, No. 2, January 1945, pp. 182–95. [4] Article 1. [5] Article 1.

[6] Cmd. 6614 of 1945; published in the United States as International Civil Aviation Conference, *Final Act and related Documents*, Department of State Publication 2282, Conference Series 64. See also Stephen Latchford, "Comparison of the Chicago Aviation Convention with the Paris and Habana Conventions" in *Department of State Bulletin*, vol. XII, No. 298, 11 March 1945, pp. 411–20, and Edward Warner, "The Chicago Air Conference—Accomplishments and Unfinished Business" in *Foreign Affairs*, vol. 23, No. 3, April 1945, pp. 406–21. For the background of the discussions of the Conference see Oliver J. Lissitzyn, *International Air Transport and National Policy*, Council on Foreign Relations, New York, 1942; Sir Osborne Mance, assisted by J. E. Wheeler, *International Air Transport*, Oxford University Press, 1943 and Laurence C. Tombs, *International Organisation in European Air Transport*, Columbia University Press, New York, 1936.

Agreement on Principles having reference to the Continuance of Co-ordinated Control of Merchant Shipping, negotiated at London, there was established, on the general suspension of hostilities with Germany, a central authority, consisting of a United Maritime Council and a United Maritime Executive Board, which is to determine the employment of ships "for a period not extending beyond six months after the general suspension of hostilities in Europe or the Far East, whichever may be the later";[1] these bodies may constitute the germ of a future international shipping authority. The Intergovernmental Committee on Refugees, originally established as the result of the Evian Conference of 1938, has been reorganized and has adopted new rules defining its constitution and procedure.[2] A United Nations Conference held in London in November 1945 has approved the Constitution of a United Nations Educational, Scientific and Cultural Organization with a broad mandate to collaborate in the work of advancing the mutual knowledge and understanding of peoples, to give fresh impulse to popular education and to the spread of culture, and to maintain, increase and diffuse knowledge.[3] The United Nations Relief and Rehabilitation Administration has been entrusted with important functions in the field of public health,[4] and in due course a permanent international health organization will presumably be established to continue, in co-operation with the International Labour Organization, the Pan-American Sanitary Bureau, and similar general and regional bodies, the work concerning public health initiated by the International Office of Public Health and the Health Organization of the League of Nations. The establishment of such an organization was contemplated at the San Francisco Conference. An Agreement concerning the Establishment of a European Central Inland Transport Organization was signed in London on 27 September, 1945, on behalf of eleven countries.[5] Proposals for an international commodity control organization have been under consideration by governments.[6] An Anglo-American Agreement on Petroleum, signed in London on 24 September 1945[7] in substitution for an Agreement signed in Washington on 8 August 1944[8]

[1] *International Agreement on Principles having reference to the Continuance of Co-ordinated Control of Merchant Shipping*, London, 5th August 1944, Cmd. 6556 of 1944.

[2] Intergovernmental Committee on Refugees, *Rules for the Constitution and Procedure, Minutes of the Fourth Plenary Session of the Intergovernmental Committee on Refugees* held in London from 15th August to 17th August 1944; a further reorganization of the Committee was envisaged at the fifth plenary session held in Paris in November 1945.

[3] Conference of Allied Ministers of Education, *Draft Proposals for an Educational and Cultural Organisation of the United Nations*, London, His Majesty's Stationery Office, 1945; for a background study of the scope for such an organization see Walter M. Kotschnig, *Slaves Need no Leaders*, New York, 1943; cf. Alfred Zimmern, *Learning and Leadership*, Oxford, 1938.

[4] Resolutions Nos. 8 and 29 of the First Session of the UNRRA Council; Report of the Subcommittee on Policies with respect to Health and Medical Care of the First Session of the UNRRA Council; Resolution No. 52 of the Second Session of the UNRRA Council concerning the Emergency Sanitary Conventions.

[5] United Kingdom, U.S.A., U.S.S.R., France, Yugoslavia, Norway, Netherlands, Belgium, Luxemburg, Greece, and Czechoslovakia; Poland signed a few days later. The Agreement (Cmd. 6685 of 1945) supersedes a Provisional Agreement of 8 May 1945 to which the United Kingdom, U.S.A., Belgium, France, Luxemburg, the Netherlands and Norway were parties (Cmd. 6640).

[6] See, e.g., International Labour Office, *Intergovernmental Commodity Control Agreements*, Montreal, 1943, and literature there cited; League of Nations, *Economic Stability in the Post-War World*, Report of the Delegation on Economic Depressions, Part II, 1945, Chapter XIX, "International Anti-Depression Measures for Raw Material and Food Producing Countries", pp. 265–75; P. Lamartine Yates, *Commodity Control*, London, 1943; Herbert Feis, *The Sinews of Peace*, New York, 1944; Cmd. 6709 of 1945, pp. 11–13.

[7] *The Times*, 25 September 1945, p. 3; Cmd. 6683 of 1945.

[8] Cmd. 6555 of 1944.

which was not brought into force, contemplates the establishment of an International Petroleum Council.[1] International organizations for questions of commercial policy[2] and of anti-depression policy[3] and for supervision of the operations of international cartels have been envisaged.[4] An agency for the development and control of atomic energy may conceivably be added to these.[5] An official organization for the technical standardization of industrial products will probably be needed to place on a more official basis, under an appropriate degree of public control, the pre-war work of the International Federation of National Standards Associations and the present work of the United Nations Standards Co-ordinating Committee.[6] Proposals for the establishment of regional commissions for dependent territories, designed to supplement the international trusteeship system by machinery for co-operation between States with colonial territories in certain regions and other States having a major strategic or economic interest therein, are receiving official consideration,[7] and a beginning has already been made by the establishment by the United Kingdom and the United States of the Anglo-American Caribbean Commission[8] and the conclusion by Australia and New Zealand of the Australia-New Zealand Agreement which provides for the establishment of a South Seas Regional Commission.[9] There has been much discussion of the possibility of establishing by international action regional development agencies for certain parts of the world modelled upon the Tennessee Valley Authority.[10] Among existing bodies the International Labour Organization is re-equipping itself to discharge the broader respon-

[1] Article III.

[2] See, e.g., League of Nations, *The Transition from War to Peace Economy*, Report of the Delegation on Economic Depressions, Part I, 1943, pp. 107–8; Herbert Feis, *op. cit.*, pp. 151–92; and Alvin Hansen, *op. cit.*, pp. 91–106; Cmd. 6709 of 1945, pp. 4–10.

[3] See, e.g., the Australian proposals concerning an employment agreement in International Labour Conference, Twenty-sixth Session, Philadelphia, 1944, *Record of Proceedings*, pp. 312–15 and 327–38, and Commonwealth of Australia, *Documents relating to the United Nations Monetary and Financial Conference*, Government Printer, Canberra, 1944, pp. 10–11, and cf. League of Nations, *Economic Stability in the Post-War World*, Report of the Delegation on Economic Depressions, Part II, 1945, Chapter XX, "International Administration and Co-ordination of Contra-Cyclical Policies", pp. 276–90.

[4] See the correspondence on the subject between the President and Secretary of State of the United States published in *The Department of State Bulletin*, Vol. XI, No. 272, 10 September 1944, p. 254 and No. 273, 17 September 1944, pp. 292–3. See also 78*th Congress*, 2*nd Session*, *Monograph No.* 1, *Senate Committee Print; Economic and Political Aspects of International Cartels*, Government Printing Office, Washington, 1944; Wendell Berge, *Cartels-Challenge to a Free World*, Public Affairs Press, Washington, D.C., 1944; Ervin Hexner, *The International Steel Cartel*, Chapel Hill, 1943; International Labour Conference, Twenty-sixth Session, Report II, *Recommendations to the United Nations for Present and Post-War Social Policy*, International Labour Office, Montreal, 1944, p. 18; Cmd. 6709 of 1945, pp. 10–11.

[5] Joint Statement concerning Atomic Energy by the President of the United States and the Prime Ministers of the United Kingdom and Canada, *The Times*, 16 November 1945, p. 4.

[6] Cf. *The Economist*, vol. CLXVIII, No. 5297, 3 March 1945, pp. 286–7.

[7] See, for instance, the speech made in the House of Commons by Colonel Stanley, Sec, of State for the Colonies, on 13 July 1943, *Parliamentary Debates*, 391 H.C. Deb. 5. s., cols. 142–5; and cf. Field Marshal Smuts in *Life*, 28 December 1942, p. 14, *War and Peace in the Pacific*, Institute of Pacific Relations, New York, 1943, pp. 55–8, K. M. Pannikar, *The Future of South-East Asia: An Indian View*, New York, 1943, and *The United Nations and Non-Self-Governing Peoples: A Plan for Trusteeship*, Commission to Study the Organization of Peace, New York, 1944.

[8] *Report of the West Indian Conference held in Barbados*, 21st–30th March 1944, Colonial No. 187 of 1944.

[9] Cmd. 6513 of 1943, or *American Journal of International Law*, vol. 38, No. 3, July 1944, Official Documents, pp. 193–200.

[10] See, for instance, Herman Finer, *The T.V.A.: Lessons for International Application*, International Labour Office, 1944, especially pp. 216–36.

sibilities entrusted to it by the Declaration of Philadelphia and the other decisions of the Philadelphia Conference of April–May 1944.[1] The Paris Conference of October–November 1945 adopted the Constitution of the I.L.O. Instrument of Amendment, 1945, dealing with membership, finance and the procedure for future amendments, and contemplated the adoption of further amendments to the constitution of the I.L.O. in 1946.[2] A comparable remodelling may prove desirable in the case of the older public international unions. The Universal Postal Convention, the International Telecommunications Convention, the Conventions of the Unions for the Protection of Literary and Artistic Works and for the Protection of Industrial Property, and the Conventions on the Transport of Goods and Passengers by Rail are all likely to require revision in varying degrees during the early post-war years, and although the international agencies created by these conventions have highly distinctive traditions it is permissible to express the hope that they will be brought into relation with the new general international organization and that during this process of revision the provisions of the Conventions which have the character of constituent instruments will be disentangled from the complicated technical conventions and regulations of which they are at present a part.

3. The effectiveness of international organization for a generation to come, and perhaps for a longer period, is likely to be profoundly influenced by the degree of wisdom shown in the framing and interpretation of the constitutions of these various bodies and any similar organizations which may be established at a later date. The main ingredient of such wisdom must be an understanding of the political, economic, and social forces which are striving to shape our times. This understanding must be the contribution of statesmanship rather than of the lawyer or of the economist. But the international lawyer as such has also a contribution to make.[3] He can make it most effectively by being actively associated with the framing and application of the various instruments, for the legal elements in the constitutional problems of international organization can rarely be divorced from political and technical considerations, but there are a number of matters in respect of which he has a special title to be heard which can usefully be reviewed in a comparative survey of the subject. Such a survey must necessarily take the form of an annotated agenda rather than that of a statement of conclusions, but such an agenda, embodying certain broad preliminary conclusions, may not be without practical value. In the following pages a certain dogmatism of exposition is employed in the interest of brevity and clarity, but every assertion is intended as a challenge to debate rather than as a statement of a definitive view and every conclusion suggested must be regarded as being at the present stage highly tentative in character.

[1] For these decisions see *Official Bulletin of the International Labour Office*, vol. XXVI, No. 1, 1 June 1944; for an estimate of the decisions of the Conference reference may be made to "The Twenty-sixth Session of the International Labour Conference: Philadelphia, April–May 1944", in *International Labour Review*, vol. L, No. 1, July 1944, pp. 1–39.

[2] See International Labour Conference, Twenty-Seventh Session, Paris, 1945, Report I, Directors Report, pp. 137–63; Report IV (1), *Matters Arising out of the Work of the Constitutional Committee*, Part I, *The Relationship of the I.L.O. to Other International Bodies*, Montreal, 1945; and *Record of Proceedings*.

[3] Cf. P. E. Corbett, "World Order—An Agenda for Lawyers", in *American Journal of International Law*, vol. 37, No. 2, April 1943, pp. 207–21.

4. In framing the constitutions of international organizations it must be remembered that a successful constituent instrument will call "into life a being the development of which could not have been foreseen completely by the most gifted of its begetters".[1] A constitution should never "partake of the prolixity of a legal code".[2] Flexibility and adaptability, combined with the attribution to the body created of powers adequate for the discharge of its responsibilities, are the essential desiderata, especially in the present phase of the development of international institutions.[3] In framing a constitution for an international organization it is vital to remember that "international law was not crystallized in the seventeenth" (or, one may interject, the early twentieth) "century, but is a living and expanding code"[4] and that "international organization may possibly have to draw on a future almost as unlimited as the past".[5] The primary objective to be sought in framing such a constitution should be to combine flexibility in respect of variables,[6] and particularly in respect of questions of structure and procedure, with forthrightness in respect of the powers conferred and the obligations accepted by States, in such manner as to afford a foundation for the development of institutions which are capable both of acquiring real authority and of adapting themselves to changing circumstances as they arise. The extent to which this objective can be achieved in any given case will necessarily be determined in large measure by political factors, but it is nevertheless desirable that it should be recognized as a primary objective of international constitutional policy.

STATEMENTS OF PURPOSES AND COMPETENCE

5. The first concern of the draftsman of a constitution for a proposed international organization will normally be to define the purpose and mandate of the organization which it is proposed to create. There are a number of conflicting considerations to be weighed when drafting preambles and introductory articles designed for this purpose. Viewing the matter from the standpoint of any one organization there is clearly much to be said for defining the purposes of that organization in broad language so as to allow the widest possible scope for future development under unforeseen conditions. On the other hand, nothing is gained and much may be lost if the purposes of a proposed organization are stated so broadly as to provoke unnecessary opposition to its establishment or to place it in the unenviable position of being patently incapable of performing more than a fraction of its mandate. The matter should not, however, be considered from the standpoint of any one organization alone, for issues of international constitutional policy of the broadest importance are involved. If there are to be a number of

[1] Mr. Justice Holmes in *Missouri* v. *Holland*, 252, U.S. 416 (1920).

[2] Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819).

[3] On the whole question see a memorandum on "The Future Development of the Constitution and Constitutional Practice of the International Labour Organization" by the Legal Adviser of the International Labour Office, in *Official Bulletin of the International Labour Office*, vol. XXVII.

[4] *In re Piracy Jure Gentium*, Judicial Committee of the Privy Council *per* Viscount Sankey L.C. [1932] A.C. 586, 592.

[5] James Lorimer, *The Institutes of the Law of Nations*, 1884, vol. II, p. 253.

[6] On the issues of general policy involved cf. James Bryce, "Flexible and Rigid Constitutions" in *Studies in History and Jurisprudence*, vol. I, Oxford, 1901, pp. 145–252.

specialized international organizations working in related fields, their respective terms of reference must clearly be defined in a manner which is calculated to promote a comprehensive and co-ordinated international effort to promote human welfare. This implies that two contrasted dangers must be avoided; on the one hand the field of primary responsibility of each organization must be defined sufficiently clearly, and with sufficient regard to the fields of action of already existing organizations, to avoid unnecessary and harmful overlapping of jurisdiction; on the other hand, it must be recognized that certain organizations have an interest in matters for which they do not claim primary responsibility,[1] each organization must have a competence sufficiently comprehensive to enable it to deal effectively with matters incidental to the handling of the questions for which it has primary responsibility,[2] and all but the most highly-specialized organizations should have powers sufficiently general to allow of some elasticity in the future distribution of business among them and avoid the existence of patches of no man's land in respect of which none of the specialized organizations has constitutional power to assume responsibility. The relative weight to be attached to each of these various considerations will of course differ from one case to another; of all the problems which arise in the framing of constitutional instruments for international bodies there is probably no other in respect of which the circumstances of the individual case must be so completely controlling. In case of doubt, however, it will normally be wise to be guided by the conviction that growth and change are the blood-stream of life, and that life is likely to pass by any body the constitutional forms of which are so framed that it is unable to adapt itself to the changing needs of a revolutionary epoch. There was great wisdom in the provisions of the Covenant which empowered the Council and Assembly of the League to deal with any matter within the sphere of action of the League,[3] a sphere which included the whole field of international co-operation in addition to the promotion of international peace and security. The Constitution of the International Labour Organization achieves a similar result in the field of social policy in the broadest sense, partly by defining the purpose of the Organization as "the promotion of the objects set forth in the Preamble",[4] which is expressed in very general terms, and partly through a provision that the International Labour Office shall have, in addition to the functions specifically attributed to it by the Constitution, such other powers and duties as may be attributed to it by the International Labour Conference.[5] The Constitution of the Food and Agriculture Organization of the United Nations gives the F.A.O. a residuary power "generally to take all necessary and appropriate action to implement the purposes of the Organization as set forth in the Preamble",[6] which is expressed in broad language, and provides that the F.A.O. Conference "may by a two-thirds majority of the votes cast

[1] See, e.g., Declaration of Philadelphia, Section II (d), *Official Bulletin of the International Labour Office*, vol. XXVI, No. 1, 1 June 1944, p. 2, and International Labour Conference, Twenty-sixth Session, Report I, *Future Policy, Programme and Status of the I.L.O.*, pp. 7–10 and 39–46.

[2] Cf. Declaration of Philadelphia, Section II (e); see also the advisory opinions given by the Permanent Court of International Justice in the cases relating to the incidental regulation of agricultural production and of the personal work of the employer, P.C.I.J., Series B, Nos. 2/3 and 13.

[3] Articles 3 (3) and 4 (4).

[4] Article 1 (1).

[5] Article 10 (5).

[6] Article 11, paragraph 3 (c).

agree to discharge any other functions consistent with the purposes of the Organization which may be assigned to it by governments or provided for by any arrangement between the Organization and any other public international organization".[1] The gradual attribution of new functions in this manner by successive instruments may be a valuable contribution to the development of an international organization.[2] Generally speaking, the Bretton Woods texts and the International Civil Aviation Convention use more restrictive language, but the Articles of Agreement of the International Monetary Fund provide that the Fund shall "promote international monetary co-operation through a permanent institution which provides the machinery for consultation and collaboration on international monetary problems",[3] and the International Civil Aviation Convention gives the International Civil Aviation Organization a mandate "to develop the principles and techniques of international air transport"[4] so as to achieve certain specified purposes, one of which is "to promote generally the development of all aspects of international civil aeronautics".[5] Broad grants of power such as are contained in the Constitution of the International Labour Organization and the Constitution of the Food and Agriculture Organization of the United Nations necessarily involve some overlapping of jurisdiction, but, if adequate arrangements for co-ordination are evolved, the advantages of such overlapping, which will permit of considerable flexibility, will probably outweigh the disadvantages.

MEMBERSHIP

Inter-State and Intergovernmental Organizations

6. After defining the purposes of the proposed organization the draftsman of an international constituent instrument will normally proceed to formulate the rules governing membership of the organization. The first question requiring consideration in this connection is whether the organization should consist of governments or of States. The difference is not one of technical form but one of fundamental conception, and it has, in the present phase of international institutional development, an importance comparable to that of the classical distinction between a confederation and a federation in the evolution of the public law of the principal federal States. Just as the distinguishing characteristic of a federation as contrasted with a confederation is "that the central government should enter normally into important direct relations with the citizens, instead of merely acting on them through the governing organs of the part-States"[6] so, in the less integrated framework of the international polity, the distinguishing characteristic of an international as contrasted with an inter-governmental organization is that it embraces in its membership the totality of the institutions of its member States and not merely their executive agencies.[7] Except in the cases of international river

[1] Article IV, paragraph 6.
[2] Cf. League of Nations, *Powers and Duties Attributed to the League of Nations by International Treaties*, League Document C. 3. M. 3., 1944, V.
[3] Article I, Clause (i). [4] Article 44. [5] Article 44 (i).
[6] Henry Sidgwick, *The Elements of Politics*, 2nd edition, London, 1897, pp. 537–9.
[7] Cf. E. J. Phelan, *Yes and Albert Thomas*, 1936, p. 143.

commissions and bodies entrusted with the administration of internationalized zones, international organizations are unlikely to be given direct authority over individuals on any extensive scale in any predictable future. The international institutions of the post-war period will continue to be primarily instruments for the organization of co-operation between States.[1] In these circumstances it is of special importance that these institutions should be inter-State and not merely intergovernmental in character; that the obligations embodied in their constitutions should be accepted as binding on all the organs of States members and not merely on their governments;[2] and that the legislative and judicial as well as the administrative machinery of their member States should be regarded as part of their normal machinery for the accomplishment of the functions entrusted to them. There is nothing new or revolutionary in this conception. The League of Nations and the International Labour Organization consist of States and the general international organization established by the Charter of the United Nations also consists of States; the Pan-American Union is an agency of the American Republics. It is eminently desirable that those of the specialized international organizations which are designed to be of a permanent character should also be organizations of States rather than of governments. On the whole, this appears to be the current tendency. The Food and Agriculture Organization consists of member nations[3] and the International Civil Aviation Convention provides for the establishment of an International Civil Aviation Organization consisting of member States.[4] The intergovernmental formula has been adopted for UNRRA,[5] the Intergovernmental Committee on Refugees,[6] and the United Maritime Council,[7] but has not as yet been unequivocally adopted for any new permanent organization. In the Bretton Woods texts, however, rather loose terminology is employed. The original members of the International Monetary Fund are to be the *countries* represented at the United Nations Monetary and Financial Conference *whose governments accept membership* before a prescribed date,[8] but thereafter membership is to be open to the *governments of other countries* at such times and in accordance with such terms as may be prescribed by the Fund.[9] The original members of the Bank are to be those *members of the Fund* which accept membership in the Bank before a prescribed date,[10] and thereafter membership is to be open to the other *members of the Fund* at such times and in accordance with such terms as may be prescribed by the Bank.[11] In certain other provisions of the Bretton Woods texts the terms "member country" and "member government" are used as though they were interchangeable,[12] which they are not, either in law or in logic, except by an extremely loose use of language. In these circumstances it is perhaps not a work of supererogation to insist on the importance of maintaining the

[1] Cf. J. L. Brierly, *The Outlook for International Law*, Oxford, 1944, pp. 7–12, and Manley O. Hudson, *International Tribunals: Past and Future*, Washington, 1944, pp. 187–203.

[2] In regard to financial obligations see paragraph 53 below.

[3] Article II (1).

[4] Article 48 (b).

[5] Article II.

[6] Article 1 (1).

[7] Annex, paragraph 2.

[8] Article II, Section 1.

[9] Article II, Section 2.

[10] Article II, Section 1 (a)

[11] Article II, Section 1 (b).

[12] E.g., Fund Agreement, Article XII, Section 3 (b), Article XIII, Section 2 (a), Article XIII, Section 2, Signature Clause, and Schedule D, paragraph 7.

inter-State, as opposed to the inter-governmental, principle in the drafting of future instruments. In certain countries the question of the procedure for the acceptance of international engagements has an important political aspect[1] which sometimes preoccupies those responsible for framing instruments to such an extent that relatively little consideration is given to matters of long-range international institutional policy. Among such matters the concept that international institutions are essentially institutions of the family of nations,[2] and not merely arrangements between the governments of their members, has both important practical implications and a far-reaching bearing on the fundamentals of the political philosophy of international organization. The concept should also be borne in mind when framing national legislation relating to international organizations.[3]

Admission to Membership

8. Assuming that it has been decided that the proposed organization is to consist of States, the next question requiring consideration in the drafting of its constituent instrument will be the determination of the States which are to be entitled to become original members and of the arrangements which are to govern the admission of other States to membership. The new international bodies created during the concluding stages or the aftermath of the war will be established during a period of highly abnormal conditions, but their constitutions will, except in such cases as that of UNRRA, presumably be designed to be of permanent operation, and it is therefore important to exclude from them any reflection of current conditions which may be an embarrassment in years to come. The question of the time at which and the conditions under which neutral and ex-enemy States should be admitted to international organizations created by the United Nations is largely political in character, but the importance of framing provisions on the subject in such a manner that they are not, without achieving any substantial purpose, regarded as discriminatory in effect in years to come, is one which may properly be called to mind by international lawyers who have not yet forgotten the conundrums which confronted them when the politicians appealed to them to "separate" the Covenant from the Treaty

[1] As regards the United States see, for instance, Wallace McClure, *International Executive Agreements*, New York, 1941; Kenneth Colegrove, *The American Senate and World Peace*, New York, 1944; Edward S. Corwin, *The President's Control of Foreign Relations*, Princeton, 1917, and *The Constitution and World Organisation*, Princeton, 1944; S. B. Crandall, *Treaties, their Making and Enforcement*, 2nd edition, 1916; Denna Frank Fleming, *The Treaty Veto of the American Senate*, New York, 1930; Quincy Wright, *The Control of American Foreign Relations*, New York, 1922, and "The United States and International Agreements" in *American Journal of International Law*, vol. 38, No. 3, July 1944, pp. 341–55.

[2] Cf. the conception embodied in Oppenheim's chapter on "The League of Nations Embodying the Family of Nations", *International Law*, vol. I, Part I, Chapter IV.

[3] The United Kingdom Diplomatic Privileges (Extension) Act, 1944, applies to organizations declared by Order-in-Council to be organizations of which His Majesty's Government in the United Kingdom and the government or governments of one or more foreign sovereign Powers are members; it is submitted that a reference to organizations of which the United Kingdom and foreign sovereign powers, or the governments thereof, are members would have been preferable; the draftsmen of the Act were presumably thinking primarily of intergovernmental organizations such as U.N.R.R.A. and the Intergovernmental Committee on Refugees, but these should not be regarded as models for new permanent organizations. 7 & 8 Geo. VI, c. 44, s. 1.

of Versailles.[1] Some distinction between original members and members admitted at a later date there must doubtless be in every international organization,[2] but it would seem desirable that the distinction should be as unobtrusive as possible and that phraseology which may be only temporarily acceptable should so far as possible be excluded from the texts of the constitutions of new international bodies. Apart from the use of the term "United Nations", which has been criticized in certain quarters as inappropriate for permanent international organizations on account of its wartime associations and vigorously defended in other quarters because of these wartime associations, this principle has been fully respected in the majority of recent instruments. The Constitution of the Food and Agriculture Organization provides that the original Members of the Organization shall be such of the nations specified in an Annex as accept the Constitution and that "additional Members may be admitted to the Organization by a vote concurred in by a two-thirds majority of all the members of the Conference and upon acceptance of this Constitution as in force at the time of admission".[3] The Articles of Agreement of the Fund provide that the original members of the Fund shall be those of the countries represented at the United Nations Monetary and Financial Conference whose governments accept membership before a prescribed date and that "membership shall be open to the governments of other countries at such times and in accordance with such terms as may be prescribed by the Fund".[4] The Articles of Agreement of the Bank provide that the original members of the Bank shall be those members of the Fund which accept membership in the Bank before a prescribed date and that "membership shall be open to other members of the Fund at such times and in accordance with such terms as may be prescribed by the Bank".[5] The Members of the Intergovernmental Committee on Refugees are the governments set out in the Schedule of the Rules for the Constitution and Procedure of the Committee,[6] and the Executive Committee may invite non-Member Governments to become Members of the Committee.[7] All of these provisions appear to allow of the necessary flexibility and afford excellent models for future instruments. The only recent constituent instrument which adopts an entirely different approach to the problem is the Civil Aviation Convention. "Members of the United Nations and States associated with them and States which remained neutral during the present world conflict" are entitled to become Members of the International Civil Aviation Organization at any time by signature and ratification of, or adherence to, the Convention; no action by the Organization is required to admit them to

[1] *League of Nations Official Journal, Special Supplement No.* 189, *Records of the Nineteenth Ordinary Session of the Assembly, Meetings of the Committees, Minutes of the Sixth Committee*, pp. 88–105. See also Manley O. Hudson, "Amendment of the Covenant of the League of Nations with a View to its 'Separation from the Treaties of Peace' ", in *American Journal of International Law*, vol. 33, 1939, pp. 138–45; Hans Kelsen, "Separation of the Covenant of the League of Nations from the Peace Treaties", in *The World Crisis*, Geneva, 1939, p. 133, and "Les résolutions de la S.D.N. concernant la séparation du Pacte et des Traités du Paix", in *Revue de droit international et de législation comparée*, Série 3, No. 20, pp. 101–13; and C. Wilfred Jenks, "The Separation of the Covenant from the Treaty of Versailles", in *Acta Scandinavica Juris Gentium*, vol. VIII, Fasc. 3, pp. 50–60.

[2] For League practice see Manley O. Hudson, "The Members of the League of Nations", in *British Yearbook of International Law*, vol. XVI, 1935, pp. 130–52.

[3] Article II.

[4] Article II.

[5] Article II, Section 1.

[6] Article I (2).

[7] Article I (3) and II (5).

membership.[1] States which are not original signatories and are not entitled to adhere may, subject to approval by any general international organization set up by the nations of the world to preserve peace, be admitted to participation by means of a four-fifths vote of the Civil Aviation Assembly and on such conditions as the Assembly may prescribe, provided that in each case the consent of any State invaded or attacked during the present war by the State seeking admission shall be necessary.[2] These unusual arrangements are presumably to be explained by the desire to leave the Convention open to adherence by the U.S.S.R., which was not represented at the Chicago Conference, and the close relationship between civil aviation and world security. Since the signature of the Charter of the United Nations a new formula appears to be emerging. The U.N.E.S.C.O. Constitution provides that membership of the United Nations shall carry with it the right of membership of U.N.E.S.C.O. and that other nations may be admitted by the General Conference, acting by a two-thirds vote, upon recommendation of the Executive Board.[3] The Constitution of the I.L.O. InstrumentofAmendment, 1945, provides that "Any original Member of the United Nations and any State admitted to membership of the United Nations by a decision of the General Assembly in accordance with the provisions of the Charter may become a Member of the International Labour Organization by communicating to the Director of the International Labour Office its acceptance of the obligations of the Constitution of the International Labour Organization" and that "The General Conference of the International Labour Organization may also admit Members to the Organization by a vote concurred in by two-thirds of the delegates attending the Session, including two-thirds of the Government delegates present and voting".[4]

Withdrawal

9. When formulating the rules governing the membership of an international organization it is necessary to consider whether member States should be entitled to withdraw from the organization and whether the organization should be empowered to expel States from membership.

10. The problem of world government will always be with us and it is therefore undesirable in principle that the constitutions of international bodies designed to discharge functions of permanent importance should permit the unilateral withdrawal of individual States. The matter is of special importance in the case of the general international organization for the maintenance of peace and security, and it was therefore particularly encouraging that the Dumbarton Oaks proposals did not envisage any right of withdrawal from the proposed general organization and that the British Commentary on the Proposals placed it explicitly on record that "States would have no right of withdrawing voluntarily; the intention is that membership of the Organization shall be permanent".[5] The elimination from international constituent instruments of provisions reserving to States the right of withdrawal is clearly desirable as soon as it can be effected, in respect of the subject concerned, without divorcing the law from political reality. The Dumbarton Oaks proposals suggested that we had reached

[1] Article 92 (a). [2] Article 93. [3] Article II; Cmd. 6711 of 1945.
[4] Article 2. [5] Cmd. 6571 of 1944, paragraph 22.

the stage at which it is recognized that there can be no further contracting out from the arrangements to be made for the maintenance of peace and security. The San Francisco Conference, however, while accepting the view that it was undesirable to include in the Charter a formal clause specifically forbidding or permitting withdrawal, approved a committee report envisaging the possibility of withdrawal from the United Nations in certain eventualities.[1] In these circumstances it is clear that at the present stage in the development of world organization, the elimination of all withdrawal provisions from the constituent instruments of specialized international organizations, so far from eliminating the danger of withdrawal from such organizations would merely result in confusion in cases in which States purported to withdraw despite the absence of any provisions defining the procedure for such withdrawal. In a number of cases, moreover, the inclusion of provisions permitting withdrawal is likely to be essential in order to make instruments acceptable to the States to which they are submitted for approval. Where withdrawal is permitted, it is desirable that the right of withdrawal should be suitably restricted. Two restrictions on withdrawal are provided for in the Covenant,[2] in the Agreement constituting the United Nations Relief and Rehabilitation Administration,[3] and in the Constitution of the Food and Agriculture Organization of the United Nations,[4] namely, a period of notice, and a requirement that outstanding obligations shall have been fulfilled at the time when the notice is due to take effect. The period of notice provided for in the Covenant was two years; the UNRRA Agreement requires only one year; the Constitution of the Food and Agriculture Organization provides that notice shall take effect one year after the date of its communication to the Director-General subject to the Member nation's having at that time paid its annual contribution for each year of its membership, including the financial year following the date of such notice. Although this formula requires payment for a complete financial year following the year running when notice is given, and is therefore in effect a compromise between a requirement of one year's notice and a requirement of two years' notice, the period of notice for which it provides can hardly be regarded as sufficient in the case of a permanent organization. In the case of such an organization two years should, it is submitted, be regarded as a minimum period of notice, partly to allow a cooling-off period of sufficient duration to permit of reconsideration of the

[1] "The Committee adopts the view that the Charter should not make express provision either to permit or to prohibit withdrawal from the organization. The Committee deems that the highest duty of the nations which will become members is to continue their co-operation within the organization for the preservation of international peace and security. If, however, a member because of exceptional circumstances feels constrained to withdraw, and leave the burden of maintaining international peace and security on the other members, it is not the purpose of the organization to compel that member to continue its co-operation in the organization.

It is obvious, particularly, that withdrawals or some other form of dissolution of the organization would become inevitable if, deceiving the hopes of humanity, the organization was revealed to be unable to maintain peace or could do so only at the expense of law and justice.

Nor would a member be bound to remain in the organization if its rights and obligations as such were changed by Charter amendment in which it has not concurred and which it finds itself unable to accept, or if an amendment duly accepted by the necessary majority in the Assembly or in a general conference fails to secure the ratification necessary to bring such amendment into effect.

It is for these considerations that the Committee has decided to abstain from recommending insertion in the Charter of a formal clause specifically forbidding or permitting withdrawal."

[2] Article I, paragraph 3. [3] Article X. [4] Article XIX.

proposed withdrawal in certain cases, and partly because, by reason of the nature of international financial commitments and procedures, it is difficult to the point of being virtually impossible to make within any shorter period the budgetary readjustments which the withdrawal of any member which is a substantial contributor to the funds of the organization will normally involve. The provision of the Covenant requiring outstanding obligations to have been fulfilled was not interpreted as impairing the validity of a purported withdrawal by a defaulting member, but merely as an affirmation that withdrawal left outstanding obligations intact;[1] in the UNRRA Agreement and the Constitution of the Food and Agriculture Organization the Covenant formula has been modified so as to make it clear beyond a peradventure that a State which is in default cannot validly withdraw until it has fulfilled all outstanding obligations. It is submitted that this is the correct principle and that in regard to this point the UNRRA-FAO formula should be followed in future instruments[2]. An initial period during which withdrawal is not permissible, such as is provided for in the Constitution of the Food and Agriculture Organization, may be a useful additional device for helping a body to weather its early difficulties. Experience has already made it apparent that these suggested principles will not be acceptable in respect of all the new international organizations. The Articles of Agreement of the International Monetary Fund and of the International Bank for Reconstruction and Development both permit members to withdraw at any time and provide that notice of withdrawal shall become effective on the date on which it is received by the Fund or the Bank as the case may be.[3] When a member withdraws from the Fund normal transactions of the Fund in its currency are to cease and settlement of all accounts between it and the Fund is to be made with reasonable despatch by agreement between it and the Fund or, failing such agreement, on the basis of rules laid down in a schedule to the Fund Agreement.[4] When a member withdraws from the Bank it remains liable for its direct obligations to the Bank and for its contingent liabilities to the Bank so long as any part of the loans or guarantees contracted before it ceased to be a member are outstanding, but it ceases to incur liabilities with respect to loans and guarantees entered into thereafter by the Bank and to share either in the income or the expenses of the Bank; its shares are to be repurchased by the Bank in accordance with conditions laid down in the Bank Agreement.[5] In the cases of the Fund and the Bank provision for withdrawal without notice has been thought necessary as a safeguard for the economic independence of the participating countries, but these bodies enjoy certain advantages not shared by the Food and Agriculture Organization. Neither the Fund nor the Bank is likely to be affected by the loss of prospective revenue in the same manner as organizations the principal financial resources of which consist of their annual income from member States; in both cases administrative expenses will be small in proportion to the financial resources under their control and will

[1] See on this point the notes by P.J.N.B. and X in *British Year Book of International Law*, vol. XVI, 1935, pp. 153–5.

[2] The Constitution of the I.L.O. Instrument of Amendment, 1945, contains a similar formula and requires two years' notice.

[3] Fund Agreement, Article XV, Section 1; Bank Agreement, Article VI, Section 1.

[4] Article XV, Section 2.

[5] Article VI, Section 4.

normally be defrayed from profits and not directly from government contributions.[1] The Fund is empowered by its Articles of Agreement to deduct any amounts due to it, including charges accruing after the date of withdrawal, when repaying the quota of a withdrawing member,[2] and the Bank has a similar power to withhold any amount due to a former member in respect of the purchase of its shares so long as the government, central bank, or any agency of that member remains liable, as borrower or guarantor, to the Bank.[3] Wherever possible it would seem desirable to combine provisions of this type with requirements in regard to notice comparable to those of the Covenant.

Expulsion and Suspension from the Exercise of Rights and Privileges

11. The constitutions of certain international organizations permit the expulsion of members in certain circumstances. The Covenant of the League, for instance, provided that any member of the League which had violated any covenant of the League might be declared to be no longer a Member of the League by a vote of the Council concurred in by the Representatives of all the other Members of the League represented thereon.[4] This power was exercised by the Council to expel the Soviet Union from the League in 1939.[5] The dramatic changes which have occurred in world affairs since that date confirm the view which the present writer ventured to express in 1935 that expulsion is a crude device "quite incapable of achieving any lasting result in a community the units of which are States.[6] The effect of expulsion is to release a State from its obligations towards other States under the constitution of the organization from which it is expelled; such action affords no real remedy for breaches of international law or of international public morality; at best it is merely an *alibi* for the failure of other States to devise effective means of enforcing the provisions which have been flouted;[7] a decision to expel is liable to be taken in a discriminatory manner on the basis of transient political considerations rather than on the basis of the relative gravity of the breach of law and order which has occurred; and it is likely to make vastly more difficult the reintegration of the State concerned into an organized international community when circumstances have changed. Where the continued membership in an organization of a State violating the obligations of membership would prevent the organization from fulfilling its functions effectively, expulsion may be a necessary evil; but it should normally be possible to provide for such cases by empowering the organiza-

[1] Fund Agreement, Article V, Section 8, and Article XX, Section 2 (d); Bank Agreement, Article IV, Sections 4, 5, and 7, and Article XI, Section 2 (d).

[2] Schedule D, paragraph 1. [3] Article VI, Section 4 (c) (i). [4] Article 16 (4).

[5] It has recently been argued that the resolution adopted by the Council on 14 December 1939 did not have the legal effect of terminating the membership of the USSR in the League of Nations; see Leo Gross, "Was the Soviet Union Expelled from the League of Nations?" in *The American Journal of International Law*, vol. 39, No. 1, January 1945, pp. 44–5.

[6] C. W. Jenks, "Expulsion from the League of Nations", in *British Year Book of International Law*, vol. XVI, 1935, pp. 155–7.

[7] Cf. "The International Law of the Future: Principles, Postulates and Proposals", in *American Journal of International Law*, vol. 38, No. 2, April 1944, pp. 91–4, and Inter-American Juridical Committee "Report on the Dumbarton Oaks Proposals submitted to the Pan-American Union for Distribution to the American Governments", in *American Journal of International Law*, vol. 39, No. 1, January 1945, *Official Documents*, pp. 63–4.

tion to suspend defaulting members from all or any of the rights and privileges of membership without thereby releasing them from any of their obligations towards the organization or producing the long-term political effects of an irrevocable act of expulsion. This view, while still by no means general, appears to be winning a measure of acceptance. The Charter of the United Nations contemplates the suspension from the exercise of the rights and privileges of membership of any member of the general international organization against which preventive or enforcement action has been taken by the Security Council, and provides for expulsion only in the case of a member which persistently violates the principles contained in the Charter.[1] The Articles of Agreement of the International Monetary Fund empower the Fund to declare a member which fails to fulfil any of its obligations under the Agreement ineligible to use the resources of the Fund.[2] Only if, after expiration of a reasonable period, the member persists in its failure to fulfil any of its obligations under the Agreement, or a difference between a member and the Fund concerning a change in the par value of its currency effected despite the objection of the Fund continues, may the Fund require the member to withdraw from membership by a decision of the Board of Governors carried by a majority of the governors representing a majority of the total voting power.[3] Regulations are to be made to ensure that, before a member is either declared ineligible to use the resources of the Fund or required to withdraw from membership, it is informed in reasonable time of the complaint against it and given an adequate opportunity for stating its case, both orally and in writing.[4] The Articles of Agreement of the International Bank for Reconstruction and Development provide that if a member fails to fulfil any of its obligations to the Bank, the Bank may suspend its membership by decision of a majority of the governors exercising a majority of the total voting power, and that the member so suspended shall automatically cease to be a member one year from the date of its suspension unless a decision is taken by the same majority to restore the member to good standing; while under suspension, a member is not to be entitled to exercise any rights under the Agreement, except the right of withdrawal, but is to remain subject to all obligations.[5] These provisions are indicative of a changing attitude towards the question of expulsion from international organizations; it is reasonable to hope that in the framing of future international constituent instruments the emphasis will be still further shifted from the conception of expulsion to that of the suspension of rights and privileges. In this respect the International Civil Aviation Convention, which permits the International Civil Aviation Assembly to suspend the voting power in the Assembly and in the Council of any contracting State that is found in default under the provisions of the chapter of the Convention concerning disputes,[6] but makes no provision for expulsion, must be regarded as the most satisfactory of existing models. In any case in which the retention of some provision for expulsion may be thought necessary, the Fund formula, which requires a fresh hearing and an affirmative decision by the Board of

[1] Articles V and VI. At one stage of the San Francisco Conference the provision for expulsion was deleted from the Dumbarton Oaks proposals by a committee of the Conference but it was afterwards restored on the insistence of the Great Powers.

[2] Article XV, Section 2 (a).

[3] Article XV, Section 2 (b).

[4] Article XV, Section 2 (c).

[5] Article VI, Section 2.

[6] Article 88.

Governors before a State which has been declared ineligible to use the resources of the Fund is required to withdraw, would appear to be greatly preferable to the Bank formula under which a suspended member automatically ceases to be a member of the Bank after one year unless it has been restored to good standing by a decision of the Board.

THE COMPOSITION OF REPRESENTATIVE ORGANS

12. Having laid down the rules governing membership, the draftsman of an international constituent instrument will normally turn to define the composition of the representative bodies of the proposed organization. There will generally be two such bodies, one including representatives of, or persons appointed by, all of the members of the organization, and the other with a more limited composition. The structure of these bodies and the demarcation of responsibilities between them will necessarily vary from case to case, but there are certain general considerations of international constitutional policy which the draftsman can usefully keep in mind, whatever may be the precise facts of the particular problem confronting him.

13. In a world in which effective action to implement the decisions of international organizations will normally be primarily national in character it is essential that the representative organs of such organizations should, in the absence of special arrangements uniquely adapted for a particular purpose such as the system of tripartite representation in the International Labour Organization,[1] and any comparable arrangements which may be possible in the case of organizations dealing with questions such as health[2] and education,[3] be composed of persons who can speak with the full authority of their governments. Such persons should, however, be encouraged, by the title given to them and the manner in which their duties are defined in the constitution of the organization concerned, to regard themselves as being simultaneously representatives of the nations appointing them and members of an international representative organ with a collective responsibility as such. Their duties should be regarded as including both the defence of national interests and the collective formulation of international policies, the establishment of a proper equilibrium between these elements in their duties being left for adjustment from time to time in the light of prevailing conditions. If a constitutional foundation can be laid for the gradual acceptance of the conception that the responsibility of persons discharging such duties to their constituencies—the individual nations—is paralleled by a responsibility as members of an international organ with a collective international

[1] For discussions of the tripartite system see International Labour Conference, Twenty-sixth Session, Report I, *Future Policy, Programme and Status of the I.L.O.*; C. Wilfred Jenks, "The Significance for International Law of the Tripartite Character of the International Labour Organization", in *Transactions of the Grotius Society*, vol. XXII, pp. 45–81; A. Hewes, "Functional Representation in the International Labour Organization", in *American Political Science Review*, vol. XXII, 1928, pp. 324–38; and Alexandre Berenstein, *Les Organisations ouvrières, leurs compétences et leur rôle dans la Société des Nations et notamment dans l'Organisation internationale du Travail* (1936).

[2] See Ludovik Rajchman, "A United Nations Health Service", in *Free World*, vol. 6, No. 3, September 1943, pp. 216–221.

[3] The U.N.E.S.C.O. Constitution provides for the selection of representatives after consultation with National Commissions broadly representative of the Government and bodies interested in educational, scientific and cultural matters, or with such bodies.

responsibility, a sound basis will be available for long-term institutional development. Substantial progress in this direction has been made in certain recent instruments. The Constitution of the Food and Agriculture Organization provides that each member of the F.A.O. shall be represented in the F.A.O. Conference by a member of the Conference.[1] The Bretton Woods texts vest the powers of the Fund and Bank respectively in Boards of Governors each consisting of one governor and one alternate appointed by each member in such manner as it may determine.[2] The International Civil Aviation Convention, on the other hand, follows the old League formula and provides that the International Civil Aviation Assembly shall be composed of representatives of member States.[3] There would appear to be a great advantage in following the F.A.O. and Bretton Woods precedents whenever possible in the future.

Limited Representative Organs

14. These considerations apply with special force to the more limited representative organs which, in most international organizations, play a decisive role in the intervals between meetings of the general representative body, and it may sometimes be possible to use terminology emphasizing the dual capacity of persons serving on such organs, even in cases in which the general representative body consists of persons who serve solely as representatives of their respective States. The Agreement concerning the Establishment of a European Central Inland Transport Organization, for instance, provides for the establishment of a Council consisting of representatives of all Member Governments and of an Executive Board consisting of seven members appointed by the Council but including members nominated by the French, U.S.S.R., the United Kingdom and the United States Governments.[4]

15. The selection of the States which are to appoint members of limited representative organs has been a source of constant difficulty to international organizations. The general principle that such organs should include both members appointed by the States with a major interest in the questions dealt with by the Organization and members appointed by other States selected from time to time on a basis which ensures fair representation to the different areas of the world, is fairly generally accepted, but the practical application of this principle in concrete cases nearly always involves prolonged and acrimonious debate.[5]

16. The designation by name of States which are to be permanently represented on such organs, though probably politically necessary in certain cases,[6]

[1] Article III, paragraph 1.

[2] Fund Agreement, Article XII, Section 2; Bank Agreement, Article V, Section 2.

[3] Article 48 (b). [4] Article III.

[5] In regard to the League of Nations see Lange, *La Société des Nations et la composition du Conseil* (1928); Popovitch, *La composition du Conseil de la Société des Nations* (1929); J. Macedo Soares, *Le Brésil et la Société des Nations.*

[6] The obvious illustration is that of the Security Council provided for in the Charter of the United Nations, Chapter V. The UNRRA Central Committee originally consisted of representatives of China, the U.S.S.R., the United Kingdom and the United States (UNRRA Agreement, Article III (3)); Canada and France were added by an amendment of the Agreement at the Third Session of the UNRRA Council. The membership of the United Maritime Executive Board is restricted to the representatives of the United Kingdom, the United States, the Netherlands and Norway, but the Board may recommend to the contracting governments additions to its membership (Annex to Agreement, paragraph 7). It is significant that both UNRRA and U.M.B. are short-term organizations.

has two serious disadvantages. It always provokes keen dissatisfaction among other States and is liable to be a source of future embarrassment in the event of a marked shift in political or economic power and responsibility. Some adaptation of the I.L.O. formula which reserves eight of the sixteen government places on the Governing Body for representatives of the States of chief industrial importance[1] would therefore appear to be preferable to the designation by name of the States which are to be permanently represented. It is of interest that an adaptation of this device has recently been used in the International Civil Aviation Convention, which requires the Assembly of the Organization, when selecting the Council, to give adequate representation to "the States of chief importance in air transport", and "the States not otherwise included which make the largest contribution to the provision of facilities for international civil air navigation".[2] Under the civil aviation formula, however, there appears to be no guarantee that the Assembly will respect this injunction, whereas under I.L.O. practice the States of chief industrial importance are selected by the Governing Body on the basis of statistical criteria and hitherto there has been a right of appeal to the Council of the League;[3] although in the course of the nineteen-thirties this right of appeal came to be regarded as obsolete, its existence during the formative years of the Organization emphasized that the selection of the eight States is a quasi-judicial function. The Civil Aviation Organization will presumably evolve rules of procedure designed to ensure that, when electing members of the Council, the Assembly has before it some authoritative statement of the relative importance of the members of the Organization in respect of air transport and the provision of facilities for international civil air navigation.

17. Three interesting experiments in regard to the composition, powers, and method of operation of limited representative organs have been made in recent instruments.

(*a*) The Articles of Agreement of the International Monetary Fund and of the International Bank for Reconstruction and Development embody arrangements concerning the selection of executive directors which are designed to ensure that all members are represented by an executive director appointed by them or elected by the votes of their governors. Five of the executive directors of the Fund are to be appointed by the five members having the largest quotas; and five of the executive directors of the Bank by the five members having the largest number of shares. The other executive directors are to be elected in accordance with complicated rules of voting designed to ensure that each elected director is elected by the votes of identifiable governors and that the votes of all governors contribute, or are in the last resort deemed to contribute, to the election of an identifiable executive director. The result is that each executive director has a fixed

[1] Constitution of the I.L.O., Article 7, paragraph 2.

[2] Article 50 (b).

[3] Article 7, paragraph 3, of the Constitution. A proposed amendment to the Constitution now under consideration provides that "The Governing Body shall from time to time determine which are the Members of the Organization of chief industrial importance and shall make rules to ensure that all questions relating to the selection of the Members of chief industrial importance are impartially considered by a committee before being decided by the Governing Body."

constituency of governors which he is regarded as representing and each governor has a representative among the executive directors. The system is as ingenious as the electoral rules necessary to produce this result are complicated, but it has not yet stood the test of practical operation. In some ways it appears to be unnecessarily complicated. It is not clear, for instance, why it is necessary to distinguish between appointed and elected directors when the members entitled to appoint directors have a voting power sufficient to elect their nominees under the rules concerning elected directors. But the device is strikingly novel and the manner in which it works in practice will be deserving of close study. If it works well it may serve as a model to be copied in the constitutions of other organizations based on the principle of weighted voting.

(*b*) In other cases it may be possible to eliminate or reduce the difficulties which the composition of the limited representative organs of international bodies so frequently presents by the adoption of the two principles, representing a marked departure from the practice of the League of Nations, which constitute the basis of the relevant provisions of the F.A.O. Constitution. The first of these principles is that the powers of the executive committee are not inherent but are delegated from the F.A.O. Conference, their extent being determined by it and their exercise being subject to review by it.[1] The second principle, which flows from the first, is that members of the executive committee are to exercise the powers delegated to them on behalf of the F.A.O. Conference as a whole and not on behalf of the individual governments which appointed them.[2] In constitutions in which these principles are adopted it may be proper and necessary to provide that certain powers may not be delegated to the executive committee,[3] but it would appear to be inconsistent with the general economy of such constitutions that they should specifically confer particular powers upon the executive committee. It would also appear inappropriate to define in a constitution the period of office of members of an executive committee which exercises delegated powers. It is essential that such a committee should enjoy and retain the full confidence of the body to which it is responsible, and this condition is more likely to be fulfilled if its term of office can be modified if necessary by the general conference or corresponding organ of the body concerned. In the present phase of international institutional development this F.A.O. system will probably be acceptable only in respect of executive committees the activities of which are inherently unlikely to prejudice major national interests.

(*c*) A third significant recent development is the emergence of the conception that it may be desirable for limited representative organs to be in permanent session. The Charter of the United Nations provides that the Security Council shall be so organized as to be able to function continuously and that each Member of the Council shall for this purpose be represented at all times at the seat of the Organization.[4] The Articles of Agreement of the Fund and the Bank provide that the Executive Directors shall function in

[1] F.A.O. Constitution, Article 5, paragraph 3.

[2] *Ibid.*, Article 5, paragraph 4. The same principle is adopted in the U.N.E.S.C.O. Constitution, Article V (11).

[3] *Ibid.*, Article 5, paragraph 3.

[4] Article 28.

continuous session at the principal offices of the Fund and Bank respectively.[1] The Civil Aviation Convention provides that the Council of the International Civil Aviation Organization shall be "a permanent body", and this appears to be interpreted as meaning that it shall be in permanent session. The development of limited representative organs of this type would represent a profound transformation of the working pattern of international institutions, judgment on which must necessarily be suspended until its advantages and disadvantages can be assessed in the light of experience.

18. It is usual to make provision for the participation in the proceedings of limited representative organs of representatives of States not represented thereon which are specially and directly affected by the question under consideration. Under the Covenant such representatives enjoyed temporarily the full status of members of the Council. The Covenant provided that "Any Member of the League not represented on the Council shall be invited to send a representative to sit as a member at any meeting of the Council during the consideration of matters specially affecting the interests of that Member of the League".[2] This conception is now tending to be replaced by provision for the participation of representatives of such members in the proceedings without the status of temporary membership of the limited representative organ. In contrast to the Covenant, the Charter of the United Nations provides for the participation of such members without a vote in the proceedings of the Security Council and the Economic and Social Council,[3] the only exception being a provision that when the Security Council has decided to use force it shall, before calling on a Member not represented on it to provide armed forces in fulfilment of the obligations assumed by the Member, invite that Member, if the Member so desires, to participate in the decisions of the Security Council concerning the employment of contingents of that Member's armed forces.[4] The UNRRA Agreement provides that the Central Committee "shall invite the participation of the representative of any member government at those of its meetings at which action of special interest to such government is discussed".[5] The Bretton Woods texts, despite the care taken to ensure that all governors nominally have a representative among the executive directors, provide that the Boards of Governors of the Fund and the Bank shall adopt regulations under which members not entitled to appoint an executive director may send a representative to attend any meeting of the executive directors when a request made by, or a matter particularly affecting, that member is under consideration.[6] The International Civil Aviation Convention provides that any member State may participate, without a vote, in the consideration by the Council and its committees and commissions of any question which especially affects its interests.[7] The F.A.O. Constitution leaves the matter to be dealt with by rules of procedure, but it would be entirely inconsistent with the principle that members of the Committee act on behalf of the whole Conference and not as representatives of their respective governments to accord voting rights to a person participating in the proceedings as representative of a government specially interested in

[1] Article XII, Section 3 (g), of the Fund Agreement; Article V, Section 4 (e), of the Bank Agreement.
[2] Article 4 (5).
[3] Articles 31, 32, and 69.
[4] Article 44.
[5] Article III, paragraph 3.
[6] Fund Agreement, Article XII, Section 3 (j); Bank Agreement, Article V, Section 4 (h).
[7] Article 53.

the matter under consideration. Governments represented on the United Maritime Council which are not represented on the Executive Board are to be "represented by an associate member who shall be consulted by, and entitled to attend the meetings of, the Executive Board or its Branches on matters affecting ships under the authority of that government, or of matters affecting the supply of ships for the territories under the authority of that government"; as the Board and its branches proceed by agreement, no question of voting rights arises in this case.[1] The Agreement concerning the Establishment of a European Central Inland Transport Organization provides that each Member Government may appoint one or more representatives for purposes of consultation and communication with the Executive Board and that such representatives shall be fully informed of all activities of the Organization and "shall be entitled to take part in the discussions without right of vote" whenever any important question concerning the interests of the Member Government is discussed.[2] The prevailing tendency in regard to this matter reflects the gradual development of international organs from standing inter-governmental conferences into bodies with an institutional character.

Advisory Bodies representing Interests Concerned

19. While the members of the representative organs of international bodies will normally act on behalf of governments, it is of the highest importance to devise arrangements which enlist the effective support for the work of such bodies of the interests directly affected thereby. Where this cannot be done by accepting the principle of functional representation which has proved so successful in the International Labour Organization (and the absence of comparable functional constituencies, balancing each other sufficiently to protect the general interest and representing effectively organized social and economic forces, makes it difficult to envisage any extensive application of the I.L.O. precedent), it would seem desirable to give a constitutional status and function to advisory machinery designed to constitute a regular link between the international organization and the non-governmental interests affected by its work. A modest provision of this type is contained in the Constitution of the Food and Agriculture Organization which empowers the F.A.O. Conference to "convene general, technical, regional or other special conferences" and to "provide for the representation at such conferences, in such manner as it may determine, of national and international bodies concerned with nutrition, food, and agriculture".[3] The United Nations Interim Commission on Food and Agriculture, in its First Report to the Governments of the United Nations, comments on this provision as follows:

The Commission considers it important that machinery should be provided whereby the Organization could be in close touch with public opinion, receive suggestions in regard to its work, and obtain the support of representative bodies actively concerned with food and agricultural questions. The Constitution provides, therefore, that the Organization should convene general, technical, regional,

[1] Annex to the Agreement, paragraph 8. [2] Article III (8).
[3] Article VI, paragraph 2. Cf. U.N.E.S.C.O. Constitution, Article IV (3).

or other special conferences for the purpose of bringing together representatives of responsible groups concerned with the fields of activity of the Organization. A general conference might be in the nature of a forum in which problems, experience, and points of view would be discussed, suggestions brought forward, and recommendations made which the Organization would take into account in shaping its programmes of work. Governments would see that the delegations from their countries to such a general conference were fully representative of the interests involved; indeed, it might be possible in some countries for national conferences to be held at which the delegations would be nominated. The Conference might itself invite representatives from international bodies.[1]

The Agreement concerning the establishment of a European Central Inland Transport Organization provides that E.C.I.T.O. shall arrange for consultation through appropriate machinery with representatives of persons employed in inland transport on international questions of mutual concern to the Organization and such representatives within the field of the Organization's activities.[2] A broader application of the principle is provided for in the Charter of the United Nations which empowers the Economic and Social Council to "make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence" and provides that "such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned".[3] Another device for enabling an international organization to strike roots in public support is suggested by the Articles of Agreement of the International Bank for Reconstruction and Development which provide for an Advisory Council including representatives of banking, commercial, industrial, labour, and agricultural interests, which is to advise the Bank on matters of general policy.[4]

VOTING

20. The rules to be adopted in regard to voting are one of the most important matters requiring consideration during the drafting of international constituent instruments. The main points to be decided in this connection are: (*a*) whether the right to vote is to be vested in national delegations as units or in individual delegates; (*b*) whether unanimity is to be required or all or some decisions may be taken by a majority; and, if certain decisions may be taken by a majority, (*c*) whether a special majority is to be required for certain purposes, and (*d*) whether the principle of one State or delegate one vote is to be adopted or votes are to be weighted.

Unit Voting versus *the Individual Vote*

21. The traditional practice at international conferences is for national delegations to vote as units, the vote of each delegation being cast by its chairman or some other member designated by the delegation for the purpose. The Constitution of the International Labour Organization introduced the sharply contrasted principle that "Every delegate shall be entitled to vote individually on all matters which are taken into consideration by

[1] Paragraph 99.
[2] Article VII (21).
[3] Article 71. Cf. U.N.E.S.C.O. Constitution, Articles V (10) and XI (4).
[4] Article V, Section 6 (a).

the Conference";[1] in explanation of this innovation the Report of the Commission on International Labour Legislation of the Peace Conference recorded that "It was strongly felt by the Commission that if the Conference was really to be representative of all those concerned with industry and to command their confidence, the employers and workpeople must be allowed to express their views with complete frankness and freedom, and that a departure from the traditional procedure of voting by national units was therefore necessary" and indicated that "it was accordingly thought that the employers' and workpeople's delegates should be entitled to speak and vote independently of their Governments".[2] The innovation, which was regarded as a bold one in 1919, has been abundantly justified by the experience of the International Labour Organization, where individual voting has made a major contribution to the vitality of the organization and to the confidence which it commands from its constituents. It may be taken for granted that if the principle of functional representation is adopted in the future for any other international organization, individual voting will be regarded as its natural corollary. In bodies consisting exclusively of government representatives, on the other hand, the principle that delegations vote as units must be expected to be retained. It remains to be seen whether there is scope for an intermediate category of cases. One could conceive of arrangements under which each member of an organization was entitled to appoint to its general representative organs a number of members (which might be either uniform for all members of the organization or vary according to the extent of their interests in the subject-matter dealt with) the selection of whom was not governed by any fixed constitutional requirements, it being left to each country to determine how far they should be regarded as government representatives bound by instructions and how far they should be selected to represent non-governmental interest or bodies and allowed substantial or complete freedom of action. Under such a system, which might perhaps be regarded as peculiarly appropriate for an international organization dealing with educational and cultural matters,[3] individual voting would be as necessary as under the tripartite system of the I.L.O. The development of the practice of composing national delegations to international conferences on the bipartisan principle might also, in certain circumstances, make necessary the substitution of individual for unit voting.

The Twilight of Unanimity

22. The battle to substitute majority decision for the requirement of unanimity in international organization has now been largely won. The development of the League of Nations was characterized by a constant process of encroachment on the principle of unanimity,[4] and that principle,

[1] Article 4, paragraph 1.

[2] J. T. Shotwell, *The Origins of the International Labour Organization*, vol. II, Documents, New York, 1934, p. 371.

[3] The U.N.E.S.C.O. Constitution provides for unit voting, Article IV (8).

[4] See, for instance, Cromwell A. Riches, *The Unanimity Rule and the League of Nations*, Johns Hopkins Press, Baltimore, 1933; G. T. Eles, *Le principe de l'unanimité dans la Société des Nations*; Sir John Fischer Williams, "The League of Nations and Unanimity" in *American Journal of International Law*, vol. 19, 1925, pp. 475–88, Julius Stone, "The Rule of Unanimity: The Practice of the Council and Assembly of the League of Nations" in *British Year Book of International Law*, vol. 14, 1933, p. 18.

although tempered in the course of years by an imposing body of constitutional practice, is rightly regarded in retrospect as having been one of the crucial weaknesses of the League. The Constitution of the International Labour Organization provides that, except as otherwise expressly provided therein, all matters shall be decided by a simple majority of the votes cast by the delegates present;[1] for certain decisions of special importance a two-thirds majority is required. The principle of majority decision came to be widely accepted in specialized international organizations during the inter-war period.[2] In the new specialized agencies some form of majority decision has become standard practice. The UNRRA Agreement provides that, unless otherwise provided by the Agreement or by action of the Council, the UNRRA Council shall vote by simple majority and only requires a special majority[3] of the Council for three purposes, the most important of which is the amendment of the Agreement;[4] the Rules of Procedure of the UNRRA Council provide that except as otherwise provided by the Agreement or the Rules all decisions of the Council shall require an affirmative majority vote of the members present.[5] The Constitution of the Food and Agriculture Organization provides that except as otherwise expressly provided therein or by rules made by the F.A.O. Conference, all matters shall be decided by the Conference by a simple majority of the votes cast.[6] The Articles of Agreement of the Fund and the Bank provide that, except as otherwise specifically provided, all decisions of the Fund shall be made by a majority of the votes cast[7] and all matters before the Bank shall be decided by a majority of the votes cast.[8] The Rules for the Constitution and Procedure of the Intergovernmental Committee on Refugees provide that "decisions may be taken in plenary session by a simple majority vote of the Delegates present and voting, except in those cases when these Rules or the Financial Regulations provide for a special majority".[9] The International Civil Aviation Convention provides that decisions of the Assembly shall, unless otherwise provided in the Convention, be taken by a majority of the votes cast[10] and that decisions by the Council shall require approval by a majority of its members.[11] The Agreement concerning the Establishment of a European Central Inland Transport Organization provides that, except as otherwise provided by the Agreement "or by action of the Council", the Council "shall vote by simple majority".[12] The cumulative effect of these developments has been to make majority rule in some form normal practice instead of a strictly limited exception to normal practice. The process of development has reached its culmination in the provisions of the Charter of the United Nations which involve the complete abandonment of the requirement of unanimity in respect of the new general international organization. Certain important decisions of the General Assembly are to require a two-thirds majority; other decisions may be taken by a majority of the members

[1] Article 17, paragraph 2. Cf. U.N.E.S.C.O. Constitution, Article IV (8).

[2] Cromwell A. Riches, *Majority Rule in International Organisation*, Johns Hopkins Press, Baltimore, 1940; N. L. Hill, "Unanimous Consent in International Organization" in *American Journal of International Law*, vol. 22, 1928, pp. 319–29.

[3] Article III, paragraph 1.

[4] Article VIII; see also Article 1 (2) (c) and IV (i).

[5] Article X, paragraph 4.

[6] Article III, paragraph 8.

[7] Article XII, Section 5 (d).

[8] Article V, Section 3 (b).

[9] Article VIII, paragraph 4.

[10] Article 48 (c).

[11] Article 52.

[12] Article III (2).

present and voting.[1] Voting in the Security Council is governed by special rules, but while, under the Yalta formula, the concurrence of all the permanent members of the Council is required for certain decisions, unanimity is not necessary in any circumstances.[2] Decisions of the Economic and Social Council and of the Trusteeship Council are to be made by a majority of the members present and voting.[3] These provisions represent the completion of a revolution of decisive importance for the future development of international organizations. In the light of them it now seems reasonable to assume that all future constituent instruments of international bodies will provide for some form of majority rule.

Special Majorities

23. The increasingly general acceptance of the majority principle has made the question of special majorities for certain types of decision of crucial importance. A number of different types of special majority are provided for in existing instruments. In some cases a simple majority of total voting power,[4] as contrasted with a simple majority of votes cast, is required. Provisions requiring a two-thirds majority of the votes cast[5] are relatively common; sometimes two-thirds of the total voting power[6] or some other proportion of either the votes cast[7] or the total voting power[8] is required; such provisions may apply to limited as well as to general representative organs.[9] It is sometimes necessary that the majority should include the representatives of all States having a definite degree of interest in, or responsibility for, the decision; on this principle the concurrence of the representatives of all the great powers,[10] or of States directly affected by the decision or responsible for its implementation,[11] or of all States entitled to permanent or quasi-permanent representation on the limited representative organ of a specialized organization,[12] or of all States contributing more than a given proportion of the resources of the organization,[13] or, under weighted voting systems, of all States entitled to cast more than a prescribed number

[1] Article 18. [2] Article 27. [3] Articles 67 and 89.

[4] E.g., Bank Agreement, Article II, Section 4.

[5] E.g., Constitution of the I.L.O., Articles 3 (7), 5, 16 (2), 16 (3), 19 (2), 26 (3) and 36; F.A O. Constitution, Articles IV (2), (3) and (6) and XIII (2).

[6] E.g., F.A.O. Constitution, Articles II (2) and XX, Fund Agreement, Article XII, Section 8.

[7] E.g., apparently, Article 93 of the Civil Aviation Convention (four-fifths vote of the Assembly), especially in view of Article 48 (c).

[8] E.g., Fund Agreement, Article III, Section (2), Article XII, Section 3 (b), Article XVI, Section 1 (c), Bank Agreement, Article V, Section 4 (b), (four-fifths of total voting power); Bank Agreement, Article II, Section 2 (b), Article IV, Section 4 (b) (i), Article IV, Section 8 (iv), Article VI, Section 3 (three-fourths of total voting power).

[9] Bank Agreement, Article VI, Section 5 (f).

[10] E.g., the Yalta formula concerning voting procedure in the Security Council, *Department of State Bulletin*, vol. XII, No. 298, 11 March 1945, p. 394; the formula is now Article 27 of the Charter.

[11] E.g., the decisions of the United Maritime Executive Board affecting the ships under the authority of any contracting government are to be reached with the consent of that government, acting through its representative on the Board or through its associate member, as the case may be; Annex to Agreement on Principles, paragraph 10; Article 44 of the Charter of the United Nations applies the same principle to the provision of armed forces for the maintenance of peace and security.

[12] E.g., UNRRA Agreement, Articles I (2) (c), IV (1) and VIII (b).

[13] E.g., Fund Agreement, Article IV, Section 7.

of votes[1] or a prescribed proportion of the total number of votes,[2] may be required. Under weighted voting systems, either a simple[3] or a special majority[4] of both States and votes is sometimes required for certain purposes. Unanimous action by the members of an organization[5] or by the members of its general[6] or limited[7] representative organ may continue to be necessary for certain decisions of exceptional importance, or for certain departures from normal procedure.

24. The circumstances in which special majorities are required vary widely according to the functions and powers of the organization concerned, but there are a number of recurring features. The Constitution of the International Labour Organization requires a two-thirds majority for the invalidation of credentials,[8] the convocation of a meeting of the Conference away from Geneva,[9] the retention on the agenda of the Conference of an item to which a Government has formally objected[10] or the inclusion of an item in the agenda for the following meeting,[11] the adoption of a recommendation or draft convention by the Conference,[12] the rejection of a nominee for the panel from which the members of Commissions of Enquiry are to be drawn[13] and the adoption by the Conference of amendments to the Constitution.[14] The UNRRA Agreement requires a unanimous vote of the Central Committee for the reference to governments of recommendations concerning such related matters, arising out of the experience of UNRRA in planning and performing the work of relief and rehabilitation, as may be proposed by any of the member governments,[15] and for recommendations by the Committee to the Council in regard to the appointment or removal of a Director-General,[16] and it requires a two-thirds vote in the Council, with further conditions in certain cases, for the approval of amendments to the Agreement.[17] The Rules of Procedure of the UNRRA Council require a unanimous vote of the Central Committee for a decision by that Committee to meet in public[18] and a two-thirds vote of the Council for a decision to deal with a matter prior to receiving a committee report[19] or for the suspension of any rule of procedure;[20] the Rules of the Standing Committees of the Council require a two-thirds majority for a decision by a standing committee to meet in public.[21] The Constitution of the Food and Agriculture Organization requires a two-thirds majority for the admission of new members to the Organization,[22] the submission of recommendations and conventions to member nations for consideration,[23] the acceptance of new functions assigned to the Organization by governments or by arrangement with any other

[1] See below, p. 41.
[2] See below, p. 41.
[3] Fund Agreement, Article XV, Section 2 (c); Bank Agreement, Article VI, Sections 2, 5 (b) and 5 (e) (ii).
[4] Fund Agreement, Article XVII (a), Bank Agreement, Article VIII (a) (three-fifths of members having four-fifths of total voting power).
[5] Fund Agreement, Article XVII (b); Bank Agreement, Article VIII (b).
[6] International Wheat Convention, 22 April–27 June 1942, Article 7 (3).
[7] Fund Agreement, Article XVI, Section 1 (a).
[8] Article 3 (7).
[9] Article 5.
[10] Article 16 (2).
[11] Article 16 (3).
[12] Article 19 (2).
[13] Article 26 (3).
[14] Article 36.
[15] Article I (2) (c).
[16] Article IV, paragraph 1.
[17] Article VIII.
[18] Article V, paragraph 3.
[19] Article IX, paragraph 1.
[20] Article XIV, paragraph 1.
[21] Article II, paragraph 3.
[22] Article II, paragraph (2).
[23] Article IV, paragraphs (2) and (3).

public international organization,[1] the approval of any arrangements defining the relations of the Organization with the new general international organization which involve modification of the Constitution of the F.A.O.,[2] and the adoption of amendments to the Constitution.[3] The Articles of Agreement of the International Monetary Fund require varying special majorities for the adjustment of quotas,[4] uniform changes in par values,[5] increases in the number of Executive Directors,[6] the publication of a report made to a member regarding its monetary or economic conditions or developments which directly tend to produce a serious disequilibrium in the international balance of payments of members,[7] a decision requiring a member to withdraw from the Fund,[8] the temporary suspension of the operations of the Fund,[9] and the acceptance of amendments.[10] The Articles of the Agreement of the Bank require varying special majorities for increases in the authorized capital of the Bank,[11] the issue of shares otherwise than at par,[12] the substitution of another currency for that specified in a loan contract,[13] the purchase or sale of miscellaneous securities for the investment of the special reserve,[14] increases in the number of Executive Directors,[15] the suspension of a member,[16] the maintenance of the membership of a member ceasing to be a member of the International Monetary Fund,[17] the permanent suspension of the operations of the Bank in respect of new loans and guarantees,[18] decisions to make distributions of the assets of the Bank,[19] and the acceptance of amendments.[20] The International Civil Aviation Convention requires a two-thirds vote of the Council for the adoption and amendment of Annexes to the Convention,[21] a four-fifths vote of the Assembly for the admission to the Organization of ex-enemy States,[22] and a two-thirds vote of the Assembly for the approval of amendments to the Convention.[23] The Rules of Procedure of the Intergovernmental Committee on Refugees require a two-thirds majority for dispensing with an Executive Committee or sub-committee report prior to action by the full Committee,[24] for the adoption of any amendment to the Rules and the Financial Regulations,[25] or for overruling a ruling by the chairman.[26] The Agreement concerning the Establishment of a European Central Inland Transport Organization requires the unanimous consent of the Council for the acquisition of transport equipment and materials by E.C.I.T.O.[27] (which would involve its development from a co-ordinating and consultative into an operating body) and for the amendment, suspension or termination of the Agreement prior to the expiration of two years from the date of signature;[28] after that time the Agreement may be amended, suspended or terminated by a two-thirds majority, subject

[1] Article IV, paragraph (6).
[2] Article XIII, paragraph (2).
[3] Article XX.
[4] Article III, Section 2.
[5] Article IV, Section 7.
[6] Article XII, Section 3 (b).
[7] Article XII, Section 8.
[8] Article XV, Section 2 (b).
[9] Article XVI, Section 1.
[10] Article XVII.
[11] Article II, Section 2 (b).
[12] Article II, Section 4.
[13] Article IV, Section 4 (b) (i).
[14] Article IV, Section 8 (iv).
[15] Article V, Section 4 (b).
[16] Article VI, Section 2.
[17] Article VI, Section 3.
[18] Article VI, Section 5 (b).
[19] Article VI, Section 5 (e) and (f).
[20] Article VIII.
[21] Article 90 (a).
[22] Article 93.
[23] Article 94 (a).
[24] Article VIII (5).
[25] Article VIII (6).
[26] Article VIII (7).
[27] Article IV (1).
[28] Article XIII.

to securing the consent of governments whose obligations or financial liability would be extended. The Charter of the United Nations requires a two-thirds majority for decisions by the General Assembly on important questions, including recommendations with respect to international peace and security, the election of members of the Security Council, the Social and Economic Council and the Trusteeship Council, the admission of members, suspension of the exercise of the rights and privileges of members, and expulsion of members, questions relating to the operation of the trusteeship system, budgetary decisions, and decisions concerning other categories of questions determined by the Assembly.[1] In accordance with the Yalta formula decisions of the Security Council on procedural matters are to be made by an affirmative vote of seven of its eleven members, while its decisions on all other matters are to be made by an affirmative vote of seven members, including the concurring votes of the permanent members, provided that the parties to a dispute are to abstain from voting while the Council is discharging its quasi-judicial function of promoting pacific settlement as distinguished from its political function of action for the maintenance of peace and security.[2]

25. In so far as one can generalize from this varied body of practice, the following conclusions suggest themselves as having some relevance to the problems likely to arise in framing constitutions for specialized organizations in the future: (*a*) A special majority is sometimes but not always required for the admission of States to membership and for decisions concerning the expulsion of members or the suspension of rights and privileges; (*b*) A special majority is normally required for the adoption of constitutional amendments; (*c*) It is not unusual to require a special majority for the acceptance of residuary functions not specifically provided for in the Constitution; (*d*) Special majorities are required by the two existing constitutions which give an organization the pre-legislative power to submit Conventions for national acceptance; (*e*) Special majorities are frequently required for budgetary decisions; (*f*) Special majorities are sometimes required for decisions impugning the action of a government or over-ruling an objection made by a government to some proposed course of action; (*g*) Special majorities are commonly required for decisions involving a departure from normal procedure; (*h*) The concurrence of the representative of a State positive action by which is necessary to make a decision effective may frequently be desirable; (*i*) It will generally be desirable that an organization should have power to prescribe from time to time further cases in which a special majority shall be required.

26. The acceptance of majority decision in international organizations is still so recent a development that it would seem to be the part of wisdom to be bold with caution. Where provision for decision by a simple majority is likely to involve substantial danger that the majority will be content to outvote the minority without making any genuine effort to reach a widely acceptable agreement, it is, if the matter at issue is of major importance, probably preferable at the present stage of international development to

[1] Article 18 of the Charter.

[2] Article 27 of the Charter. Cf. *The Department of State Bulletin*, vol. XII, No. 298, 11 March 1945, pp. 394 and 396–7.

require a special majority so calculated as to ensure that decisions have a sufficiently general backing to make them practically effective in respect of the matters at issue.[1] This consideration applies with special force to constitutional amendments,[2] and to the adoption of Conventions which can only become effective if widely ratified or ratification of which by certain States liable to be included in any substantial minority would be necessary to make them effective.

Weighting of Votes

27. Equality of voting strength in international conferences has been the subject of recurrent, and sometimes severe, criticism since the Hague Peace Conferences[3] and the desirability of weighting votes in accordance with the relative interests of different States in the matter under consideration has been widely canvassed.[4] Some of the experiments in the weighting of votes which have been undertaken already have a long history. Provision for weighted voting was made at an early stage in the development of a number of the older public international unions, partly by giving separate votes to dependencies and partly by apportioning votes in direct proportion to each country's contribution to the union's financial support.[5] In the Universal Postal Union,[6] the International Telecommunications Union[7] and the International Institute of Agriculture the attribution of votes to dependencies has played an important rôle, and the unions in which voting is proportioned to the financial contribution of each State include the International Office of Public Health and the International Institute of Agriculture (where, however, votes are taken only in the Permanent Committee and not in the General Assembly which, except in committees which are composed on the one State one vote principle, acts unanimously). The principle of weighted voting has also been adopted in the case of some of the international river commissions,[8] not without provoking sharp criticism,[9] relevant primarily to the principle of the international control of internal waterways rather than to that of weighted voting in control commissions. In some of the intergovernmental commodity control authorities, including the International Sugar Council,[10] and the Inter-American Coffee Board[11] voting power has

[1] On the limitations of the voting process in international conferences reference may be made to International Labour Conference, Twenty-Seventh Session, Paris, 1945; Report I, Director's Report, Montreal, 1945, pp. 143–44. [2] See paragraph 57 below.

[3] See, for instance, the criticisms summarized in E. D. Dickinson, *The Equality of States in International Law*, Harvard University Press, 1920, pp. 286–9.

[4] For a recent discussion see Louis B. Sohn, "Weighting of Votes in an International Assembly" in *The American Political Science Review*, vol. XXXVIII, No. 6, December 1944, pp. 1192–203.

[5] E. D. Dickinson, *The Equality of States in International Law*, Harvard University Press, 1920, pp. 310–21; Cromwell A. Riches, *Majority Rule in International Organisation*, Johns Hopkins Press, Baltimore, 1940, Chapter X, "From Equality to Qualitative Representation", pp. 245–90. See also D. P. Myers, *Non-Sovereign Representation in Public International Organs*, reprinted from *Actes du Congrès Mondial*, 2nd session, 1913.

[6] Riches, *op. cit.*, pp. 272–81. [7] Riches, *op. cit.*, pp. 281–7.

[8] Cromwell A. Riches, *Majority Rule in International Organisation*, Johns Hopkins Press, Baltimore, 1940, pp. 167–227.

[9] J. M. Keynes, *Economic Consequences of the Peace*, p. 110.

[10] Agreement concerning the Regulation of Production and Marketing of Sugar, 6 May 1937, Article 37, in International Labour Office, *Intergovernmental Commodity Control Agreements*, 1943, p. 38.

[11] Inter-American Coffee Agreement, 28 November 1940, Article 15, in *ibid.*, p. 64.

been based on the estimated interest of the country concerned as producer or consumer, and in others, including the International Tin Committee[1] and the former International Rubber Regulation Committee,[2] on the estimated relative importance of different producing countries. Weighted voting was originally provided for in the International Commission for Air Navigation, but the principle provoked sharp opposition and was abandoned;[3] there is no provision for weighting in the 1944 International Civil Aviation Convention. The most recent experiments in the weighting of votes are the Articles of Agreement of the International Monetary Fund and of the International Bank for Reconstruction and Development. The Fund Agreement provides that each member shall have two hundred and fifty votes plus one additional vote for each part of its quota equivalent to one hundred thousand United States dollars;[4] the initial quotas range from half a million United States dollars to 2,750 million United States dollars,[5] thus giving a voting range from 255 to 27,750 votes. Whenever voting is required for the waiver of any of the conditions governing the use of the Fund's resources[6] or in connection with a charge that a member is using the resources of the Fund in a manner contrary to the purposes of the Fund,[7] each member is to have the number of votes to which it is entitled adjusted by the addition of one vote for the equivalent of each four hundred thousand United States dollars of net sales of its currency, or the subtraction of one vote for the equivalent of each four hundred thousand United States dollars of its net purchases of the currencies of other members, up to the date when the vote is taken, provided that neither net purchases nor net sales are to be deemed at any time to exceed an amount equal to the quota of the member involved.[8] The Bank Agreement provides that each member shall have two hundred and fifty votes plus one additional vote for each share of stock held;[9] each share has a par value of 100,000 United States dollars, and the initial subscriptions range from 200,000 United States dollars to 3,175 million United States dollars, thus giving a voting range from 252 to 32,000 votes. These arrangements, the negotiation of which was an exceptionally arduous and difficult undertaking, are directly related to the financial structure of the Fund and the Bank, and while they may afford a model for any further institutions requiring comparable financing they are unlikely to be acceptable in any other cases. Weighted voting is most readily attainable in an organization the functions of which are sufficiently circumscribed and well-defined to afford some simple basis for the selection of criteria of relative importance capable of securing general acceptance. Where an organization has a wide range of responsibilities, the factors to be taken into account in assessing the relative interest of its members either in its work as a whole or in particular decisions are likely to be too varied and imponderable and the relative weight to be attached to the different factors is likely to be the

[1] Agreement on the International Control of the Production and Export of Tin, 9 September 1942, Article 14, in *ibid.*, p. 101.

[2] Revised Text of the Agreement regarding the Regulation of the Production and Export of Rubber, 6 October 1938, Article 15 (1), in *ibid.*, p. 128.

[3] Riches, *op. cit.*, pp. 267–72.

[4] Articles XII, Section 5 (a).

[5] Schedule A.

[6] Article V, Section 4.

[7] Article V, Section 5.

[8] Article XII, Section 5 (b).

[9] Article V, Section 3 (a).

subject of acute controversy. The division of States into a relatively small number of vote categories, conceived of as a rough approximation to justice, might be possible for a wider range of purposes, but any such proposal would always be liable to have the effect of precipitating a revived insistence on the "sovereign equality" of all peace-loving States as units of organization and not merely as legal persons entitled to the equal protection of the law. There has been some discussion of weighted voting in the International Labour Organization, but it has remained indecisive, and, except in the special case of the Bretton Woods Agreements, the tendency of recent constitutions for international bodies has been to adhere to the principle of attributing equal voting power to members without attempting to assess their relative interest in the matters at issue, which may indeed vary greatly from case to case and from time to time. Such an arrangement is frequently less unsatisfactory in practice than a theoretical appraisal of its appropriateness might suggest, for there is always an invisible weighting of votes in the deliberations of international conferences and the views of the representatives of countries which clearly have a major interest in the subject under discussion receive a degree of consideration which is not measured by the number of votes they are entitled to cast.

THE PERMANENT OFFICERS AND STAFFS OF INTERNATIONAL INSTITUTIONS

The Relationship between Permanent Officers and Staffs and Representative Organs

28. One of the major questions requiring consideration when framing the constitution of any international body is that of the nature of the relationship to be established between the permanent officers and staff of that body and its representative organs. Four different types of relationship, representing four different conceptions, may be illustrated from the experience of the last quarter of a century. They may perhaps be described as the secretarial conception, the managerial conception, the division of powers conception, and the parliamentary conception. The first conception is exemplified by the normal practice of the Council and Assembly of the League of Nations;[1] the second is illustrated by the Bank for International Settlements;[2] the third underlies the Agreement constituting the United Nations Relief and Rehabilitation Administration and is only now being put to the test of practical experience; the fourth has been the basis of the successful operation of the International Labour Organization. One cannot properly choose between these conceptions on abstract grounds of general applicability and it is probable that all of them will continue to influence in varying degrees the draftsmen of future international instruments. Broadly speaking, however, the secretarial conception, while still having its cham-

[1] For an account of this conception by the first Secretary-General of the League see Sir Eric Drummond, "The Secretariat of the League of Nations", in *Public Administration*, (1931), pp. 228–40.

[2] Concerning which see E. L. Dulles, *The Bank for International Settlements at Work*, New York, 1932, and P. Einzig, *The Bank for International Settlements*, New York, 1932.

pions,[1] has become discredited as inadequate, and the managerial conception is appropriate only in the case of operating bodies such as the Fund and the Bank which have executive directors who are intended to function in continuous session,[2] or the United Maritime Authority which is analogous in character to a Combined Board[3] and exercises its executive authority through the machinery of the United Kingdom Ministry of War Transport and the United States War Shipping Administration.[4] In general the choice to be made will therefore be that between the division of powers conception and the parliamentary conception. The division of powers conception, as exemplified in the UNRRA Agreement, involves the restriction of the rôle of the representative organs to that of policy-making and appropriating bodies, executive authority being entrusted by the constituent instrument to a Director-General who is given full power and authority for carrying out operations within the limits of available resources and the broad policies determined by the representative organs.[5] This system may be regarded as being, in its main essentials, a transposition to the international sphere of the system of government of the United States. In addition to being open to the objections which are familiar to the students of the division of powers as a pattern of national government,[6] it purports to attribute to the Director-General a degree of authority which, in a world in which international decisions are implemented primarily through national action, lacks any solid basis in political reality, save perhaps in well-defined spheres of emergency action such as relief and rehabilitation. The parliamentary conception, on the other hand, assumes that the representative organs have complete authority over their senior officer and his staff, and that the dignity of his position derives from his being their first servant; it assumes also that his administrative powers flow primarily from them rather than from an independent executive authority vested in him by virtue of his office and will be used to supplement and co-ordinate national action rather than in substitution for it,[7] but that it is part of his duty to guide the deliberations of the representative organs by focusing issues for their decision and that in fulfilling this duty he will rank as *primus inter pares* among their members. This conception developed in the International Labour Organization through the force of personality of Albert Thomas and the strength of the tradition

[1] See J. V. Wilson, "Problems of an International Secretariat", in *International Affairs*, vol. XX, No. 4, Oct. 1944, pp. 546–7.

[2] Fund Agreement, Article XII, Section 3 (g); Bank Agreement, Article V, Section 4 (e).

[3] For the organization and working of the Combined Boards reference may be made to International Labour Office, *Intergovernmental Commodity Control Agreements*, Montreal, 1943, pp. 158–71; United Kingdom Ministry of Production *Report on the Work of the Combined Raw Materials Board to January* 26, 1943, London, 1943, and *Second Annual Report on the Work of the Combined Raw Materials Board to January* 26, 1944, London, 1944; *Combined Production and Resources Board, Report of the Work . . . at conclusion of Second Year of Operations*, Washington, D.C., August 1944; National Policy Committee *Memorandum on the Combined Approach to Post-War World Trade*, Washington, 1944; and the statements concerning the continuation of the Boards until the close of the Japanese war, *The Times*, 20 January 1945, pp. 3 and 8, and the *New York Times*, 20 January 1945, p. 5.

[4] Annex to the Agreement, paragraphs 4, 5, and 13.

[5] Article IV, paragraph 2.

[6] For a recent severe American criticism of the division of powers conception see, for instance, Henry Hazlitt, *A New Constitution Now*, New York, 1942.

[7] Cf. J. Arthur Salter, *Allied Shipping Control*, Oxford 1921, Part V, International Administration, pp. 243–80.

created by him.[1] If it is desired to establish the same tradition in new bodies, it would be wise to create the strongest possible constitutional foundation for its development. This might be done by constitutional provisions giving the Directors of such bodies full power and authority, subject to the general supervision of their representative organs, to direct the work of these bodies, with the right to participate in all meetings of their representative organs and the duty to formulate for consideration by them proposals for appropriate action in regard to matters coming before them for decision. The Constitution of the Food and Agriculture Organization includes provisions of this nature[2] which may perhaps serve as a model in the drafting of the constituent instruments of any further organizations in the case of which this conception may be accepted as appropriate. The U.N.E.S.C.O. Constitution contains a similar provision.[3]

The Exclusively International Character of International Responsibilities

29. Experience has shown that the degree of international loyalty shown by the staff of an international organization is likely to be an important factor in the success or failure of the organization. It is of the utmost importance that such staffs should be invested with exclusively international responsibilities, and should not act as appointees or agents of the governments of their respective countries of origin. There is a clear-cut functional incompatibility between the responsibilities of an international official and those of the national representatives accredited to the institution in question. This principle was laid down in respect of the League of Nations in the Balfour Report of 19 May 1920[4] and reaffirmed on a number of later occasions, and from 1932 on officials of the League of Nations were required to make on appointment a solemn declaration of international loyalty, undertaking "to exercise in all loyalty, discretion and conscience the functions entrusted" to them, to discharge their functions and regulate their conduct with the interests of the League alone in view, and "not to seek or receive instructions from any government or other authority external" to the League.[5] This practice may be regarded as having set a standard for future international bodies. It was, however, a grave weakness of the Geneva arrangements that, while a clear obligation to respect the international character of their appointments and responsibilities was placed upon the League and I.L.O. staffs, no corresponding obligation was placed upon the governments of the countries of which they were nationals.[6] It would seem desirable that the

[1] Concerning which see E. J. Phelan, *Yes and Albert Thomas*, Cresset Press, London, 1936; for a discussion of the unique features of the resulting relationship with the representative organ see E. J. Phelan, "The New International Civil Service" in *Foreign Affairs*, pp. 307–14 1932–3).

[2] E.g., Article VII, paragraphs 2 and 3. [3] Article VI (3).

[4] *League of Nations Official Journal*, First Year, 1920, pp. 136–9. See also the reaffirmation of the principle by the Committee of Thirteen in *Records of the Eleventh Ordinary Session of the Assembly*, Minutes of the Fourth Committee, p. 295.

[5] *Records of the Thirteenth Ordinary Session of the Assembly*, Plenary Meetings, Text of the Debates, pp. 97, 186.

[6] The Twenty-sixth Session of the International Labour Conference adopted a resolution affirming it to be "the duty of the Members of the Organization to respect fully the international character of the responsibilities of the Director and staff of the International Labour Office and not to seek to influence any of their nationals in the discharge of such responsibilities", *Official Bulletin of the International Labour Office*, vol. XXVI, No. 1, 1 June 1944, pp. 91–2.

constitutions of future international bodies should embody such an obligation, which might appropriately take the form of an undertaking by governments to respect fully the international character of the responsibilities of officials of international bodies and not to seek to influence their nationals serving as officials in the discharge of their duties.[1] This decisive step forward has been taken in the Charter of the United Nations which provides that "in the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any Government or from any other authority external to the Organization", that "they shall refrain from any action which might reflect on their position as international officials responsible only to the Organization", and that "each member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities".[2]

30. Analogous provisions have been included in the constitutions of most of the specialized agencies. The Constitution of the Food and Agriculture Organization of the United Nations provides that the responsibilities of the staff of the Organization "shall be exclusively international in character and they shall not seek or receive instructions in regard to the discharge thereof from any authority external to the Organization" and embodies an undertaking by the member nations "fully to respect the international character of the responsibilities of the staff and not to seek to influence any of their nationals in the discharge of such responsibilities".[3] The Articles of Agreement of the International Monetary Fund provide that "The Managing Director and the staff of the Fund, in the discharge of their functions, shall owe their duty entirely to the Fund and to no other authority" and stipulate that "each Member of the Fund shall respect the international character of this duty and shall refrain from all attempts to influence any of the staff in the discharge of his functions".[4] The Articles of Agreement of the International Bank for Reconstruction and Development provide that "the President, officers and staff of the Bank in the discharge of their offices owe their duty entirely to the Bank and to no other authority" and stipulate that "Each Member of the Bank shall respect the international character of this duty and shall refrain from all attempts to influence any of them in the discharge of their duties".[5] The International Civil Aviation Convention provides that the President of the Council, the Secretary-General, and the other personnel of the Organization "shall not seek or receive instructions in regard to the discharge of their responsibilities from any authority external to the Organization" and embodies an undertaking by each member State "fully to respect the international character of the responsibilities of the personnel

[1] For a fuller discussion reference may be made to Jacques Secretan, "The Independence Granted to Agents of the International Community in Their Relations with National Public Authorities", in the *British Year Book of International Law*, vol. XVI, pp. 56–78; C. Wilfred Jenks, "Some Problems of an International Civil Service", in *Public Administration Review*, vol. III, No. 2, Sept. 1943; Royal Institute of International Affairs, *The International Secretariat of the Future*, 1944; Frank G. Boudreau, "International Civil Service" in *Pioneers in World Order: An American Appraisal of the League of Nations*, edited by Harriet Eager Davis, Columbia University Press, New York, 1944, pp. 76–86; Archibald A. Evans, "The International Secretariat of the Future" in *Public Administration*, vol. XXII, No. 2, Summer 1944, pp. 64–74.

[2] Article 100.

[3] Article VIII, paragraph 2.

[4] Article XII, Section 4 (c).

[5] Article V, Section 5 (c).

and not to seek to influence any of its nationals in the discharge of their responsibilities".[1] The Agreement concerning the Establishment of an European Central Inland Transport Organization provides that "the responsibilities of the chief officer and staff shall be exclusively international in character"[2] and that "each Member Government shall respect the exclusively international character of the chief officer and the staff of the Organization".[3] The U.N.E.S.C.O. Constitution provides that "The responsibilities of the Director-General and of the staff shall be exclusively international in character. In the discharge of their duties they shall not seek or receive instructions from any government or from any authority external to the Organization. They shall refrain from any action which might prejudice their position as international officials. Each State Member of the Organization undertakes to respect the international character of the responsibilities of the Director-General and the staff, and not to seek to influence them in the discharge of their duties."[4]

31. In respect of this important matter the Agreement constituting a United Nations Relief and Rehabilitation Administration, which includes no provision on the subject, must be regarded as incomplete, especially as the constituent instrument of a body the staff of which may exercise a considerable measure of executive authority. The omission has been in part repaired, firstly by the adoption by the UNRRA Council of a policy resolution reciting that the Council desires to promote the concept of a truly international civil service and resolving that the staff of the Administration should be "of an international character, selected upon the basis of individual competence, character, and integrity, without discrimination on the grounds of sex, race, nationality or creed, and recruited on as wide a geographic basis as possible, compatible with efficient administration"[5] and secondly, by the action of Director-General Lehman in requiring each member of his staff to give a solemn undertaking "to exercise in all loyalty, discretion and conscience the functions entrusted to them as officers or employees of the Administration, to discharge their functions and regulate their conduct with its interests alone in view, and not to seek or receive from any government or other authority external to the Administration any instructions controlling them in the performance of their official duties".[6] Such arrangements are not, however, a completely satisfactory substitute for the inclusion in the constituent instrument of an organization of an obligation binding upon governments as part of the fundamental constitution of the organization. It would seem reasonable to hope that all future international constituent instruments will include provisions on the subject analogous to those contained in the Charter, the F.A.O. Constitution, the Articles of Agreement of the Fund and the Bank, the International Civil Aviation Convention, and the U.N.E.S.C.O. Constitution.

[1] Article 59. [2] Article III (7). [3] Article VIII (14). [4] Article VI (5).

[5] Resolution No. 37 of the First Session of the UNRRA Council, paragraph 1.

[6] United Nations Relief and Rehabilitation Administration, *Report of the Director General to the Second Session of the Council,* September 1944, Council II, Document I, p. 80.

POWERS

32. The powers conferred on international bodies will necessarily vary widely with the nature of their responsibilities and the extent to which States are prepared, at any given time, to accept a measure of international control of the subject concerned. The practice of giving powers of decision to international bodies can only be developed by building up precedents adapted to the political and technical context of particular problems. The extent to which it is desirable and practicable to confer such powers is one of the major issues for consideration in the framing of any international constituent instrument.

The Adoption of International Conventions

33. Though some of the new specialized bodies will be engaged to an extent unprecedented in the inter-war period in operational transactions, it appears probable that others of them, notably those dealing with food and agriculture, health and education, will to a considerable extent continue to operate primarily by influencing national policies. Among the instruments of such influence the international convention will probably continue to play an important part. It may be true that, as is sometimes contended, the international convention was too often employed during the inter-war period to express an international standard of policy in regard to which it was unnecessary to seek the acceptance by governments of reciprocal commitments mutually binding upon them as legal obligations.[1] It may be equally true that the effect of this tendency was to discredit somewhat the convention technique. However that may be, there is a wide range of questions in respect of which it is clearly desirable that international bodies should endeavour to influence the policies of governments with a view to their acceptance of mutually binding legal obligations. Now the traditional procedure for the conclusion and entry into force of international instruments is cumbersome in the extreme. A valuable rationalization of it, which in certain respects may well serve as a model for the future, was introduced a quarter of a century ago by the Constitution of the International Labour Organization, but had relatively little effect on the practice of the League of Nations, or the general practice of the inter-war period, both of which continued to follow established tradition. The foundation of the rationalized procedure introduced by the Constitution of the International Labour Organization was the substitution of adoption by the collective act of an international conference, by a two-thirds majority, for signature by the plenipotentiaries of individual States, as the means of fixing the form of, and giving legal existence to, conventions submitted to States with a view to ratification. This substitution of the formality of adoption for that of signature is not a mere change in formalities which has no substantial

[1] See, for instance, League of Nations, *The Development of International Co-operation in Economic and Social Affairs: Report of the Special Committee, Special Supplement to the Monthly Summary of the League of Nations*, August 1939, p. 13; League of Nations, *Commercial Policy in the Inter-War Period: International Proposals and National Policies*, Geneva, 1942, pp.162–3; International Labour Conference, Twenty-Seventh Session, Paris, 1945, Report I; Director's Report, Montreal, 1945, pp. 153–58.

content; even where it is not accompanied by any more far-reaching measures (such as the further requirement of the Constitution of the I.L.O. that Conventions adopted by the Conference shall be submitted to national competent authorities, normally legislatures, for consideration, and ratified if they are approved by the competent authority), it is an important stage in the development of a procedure of collective international decision on proposals of a legislative character.[1] It is legitimate to hope that a similar rationalization of procedure will be provided for by the constitutions of all new international bodies which are likely to promote any substantial volume of international legislation. A recent precedent for such action has been established by the Constitution of the Food and Agriculture Organization which provides that the Food and Agriculture Conference "may by a two-thirds majority of the votes cast submit Conventions concerning questions relating to food and agriculture to Member nations for consideration with a view to their acceptance by the appropriate constitutional procedure".[2] The U.N.E.S.C.O. Constitution empowers the U.N.E.S.C.O. Conference to adopt for submission to Member States for their approval recommendations and international conventions.[3] The Charter of the United Nations empowers the Economic and Social Council to "prepare draft Conventions for submission to the General Assembly, with respect to matters falling within its competence".[4] If this power is used with imagination and vigour it may serve as the foundation for a far-reaching rationalization of the technique of the multipartite instrument.[5]

34. The arrangements concerning Conventions introduced by the Constitution of the I.L.O. embody a second characteristic feature: the existence of an obligation on each government to submit Conventions to the national competent authority, normally the legislature,[6] for consideration, and to ratify if it obtains the consent of that authority. It is a matter for consideration whether this device for giving national legislatures a recognized place in an international legislative process might not also be embodied in provisions conferring power to adopt Conventions on other international organizations. The U.N.E.S.C.O. Constitution requires the submission of recommendations and conventions to national competent authorities,[7] but gives no indication whether this term is used in the same sense as in the Constitution of the I.L.O.

[1] The significance of the innovation represented by the I.L.O. procedure is discussed more fully in Jean Morellet, "Un type original de traités: les conventions internationales du travail" in *Revue critique de droit international*, vol. XXXIII, No. 1, pp. 1–21, and C. W. Jenks, "Some Characteristics of International Labour Conventions" (1935) 13 *Canadian Bar Review*, p. 448.

[2] Article IV, paragraph 3.

[3] Article IV (4).

[4] Article 62.

[5] It is of interest that a proposal to confer specifically upon the General Assembly power to adopt international Conventions failed by a fraction of a vote to secure the approval of a two-thirds majority of the competent committee of the San Francisco Conference which was necessary for the inclusion of any provision in the Charter of the United Nations.

[6] On this point see a memorandum by the Legal Adviser of the International Labour Office entitled "The Nature of the Competent Authority Contemplated by Article 19 of the Constitution of the International Labour Organisation", in International Labour Conference. Twenty-sixth Session, Report I, *Future Policy, Programme and Status of the I.L.O.*, pp. 169–83, and *Official Bulletin of the International Labour Office*, vol. XXVI, No. 2, 1 December 1944.

[7] Article IV (4).

Reports

35. Whenever an international body operates mainly by influencing the policy of its members rather than by engaging in executive action or in financial or commercial transactions through its own instrumentalities, it is desirable that there should be arrangements which make it possible to assess at frequent intervals the importance and effect of its impact on national policies. For this purpose either some system of annual reports such as the Covenant requires of mandatory powers[1] and the Charter of the United Nations requires of the administering authority for trust territories[2] or some system of international investigation such as that provided for in the Agreement for the Regulation of Production and Export of Rubber,[3] or that envisaged in the proposals for a Permanent Disarmament Commission considered at the World Disarmament Conference,[4] is necessary. The International Labour Organization has a highly developed system of annual reports the scope of which has hitherto been confined to the obligations undertaken by the ratification of international labour conventions.[5] The resolution concerning social provisions in the peace settlement adopted by the International Labour Conference on 12 May 1944 contemplates the inclusion in a post-war treaty of an undertaking by the Members of the Organization that they will report to the International Labour Organization as requested by the Governing Body on the status of legislation and administration and, in so far as practicable, of practices under collective agreements between employers and workers in respect of all Conventions and Recommendations adopted by the Conference.[6] Such an undertaking would supplement the existing article of the Constitution of the I.L.O. relating to annual reports[7] which provides that reports shall be made in such form and shall contain such particulars as the Governing Body may request, thus ensuring the uniformity in the absence of which the value of a system of reports is greatly reduced, and requires the Director to lay a summary of the reports before the International Labour Conference, thus affording a constitutional foundation for the elaborate system of mutual supervision of the application of Conventions which the Conference has gradually established.[8] It would seem desirable that the constitutions of new international bodies which operate by influencing national policies should, unless they establish some appropriate system of international investigation, contain provisions of a similar character covering the whole field of interest of such bodies. The F.A.O.

[1] Article 22; concerning the working of the system see Van Rees, *Les mandats internationaux*, 2 vols., 1927–8; Quincy Wright, *Mandates under the League of Nations*, 1930; Norman Bentwich, *The Mandates System*, 1930.

[2] Article 88.

[3] Article 17, International Labour Office, *Intergovernmental Commodity Control Agreements*, 1943, pp. 129–30.

[4] League of Nations, *Conference for the Reduction and Limitation of Armaments, Documents*, vol. I, Geneva, 1932, pp. 26–8, and 136–7, and vol. II, Geneva, 1935, pp. 490–3.

[5] International Labour Conference, Twenty-sixth Session, Report I, *Future Policy, Programme and Status of the I.L.O.*, pp. 95–102 and 124–6; McNair, "The Committee of Experts on Article 408" in *British Year Book of International Law*, vol. XIII, 1933, pp. 143–5.

[6] *Official Bulletin of the International Labour Office*, vol. XXVI, No. 1, 1 June 1944, pp. 80–1.

[7] Article 22.

[8] Jean Zarras, *Le contrôle de l'application des conventions internationales du travail*, 1937.

Constitution contains such a provision requiring each Member nation to communicate periodically to the Organization reports on the progress made toward achieving the purpose of the Organization as set forth in the Preamble and on the action taken on the basis of recommendations made and Conventions submitted by the Conference. These reports are to be made at such times and in such form and are to contain such particulars as the Conference may request and are to be submitted to it by the Director-General.[1] The U.N.E.S.C.O. Constitution requires Member States to "report periodically to the Organization, in a manner to be determined by the General Conference, on its laws, regulations and statistics relating to educational, scientific and cultural life and institutions, and on the action taken on the recommendations and conventions" adopted by the Conference.[3] A provision for the communication immediately on publication of all relevant laws and regulations and official reports and statistics may be a valuable adjunct to such an obligation to make reports.[3]

36. International bodies which have operational functions may need detailed reports from governments not only to enable them to assess the general effect of their work but also in order that they may have at their disposal the data necessary to afford a sound basis for their operational decisions. The Articles of Agreement of the International Monetary Fund include a provision designed for this purpose specifying that "the Fund may require members to furnish it with such information as it deems necessary for its operations,[4] including, as the minimum necessary for the effective discharge of the Fund's duties, national data on" twelve specified matters.[5] In requesting information the Fund is to "take into consideration the varying ability of members to furnish the data requested".[6] Members are to be "under no obligation to furnish information in such detail that the affairs of individuals or corporations are disclosed",[7] but they undertake "to furnish the desired information in as detailed and accurate a manner as is practicable, and, so far as possible, to avoid mere estimates".[8] In some cases the information required as a basis for the operations of an international organization may have to be specially assembled in a report compiled on the responsibility of the Organization itself. As an illustration may be mentioned the rule laid down by the Articles of Agreement of the International Bank for Reconstruction and Development that the Bank shall not guarantee, participate in or make any loan unless a competent committee, including an expert selected by the Governor of the Bank representing the Member in whose territories the project is located and one or more members of the technical staff of the Bank, has submitted a written

[1] Article XI, paragraphs 1 to 3. [2] Article VIII.

[3] Cf. F.A.O. Constitution, Article XI, pragraph 5.

[4] The Agreement concerning the establishment of an European Central Inland Transport Organization contains a similar provision that each member government "shall, upon request of the Organization, provide it with such information as is essential for the performance of its functions". Article VIII (1).

[5] Article VIII, Section 5 (a).

[6] Article VIII, Section 5 (b).

[7] Cf. Protocol to the International Convention concerning Economic Statistics of 14 December 1928, Hudson, *International Legislation*, vol. IV, p. 2590; and Convention concerning Statistics of Wages and Hours of Work, 1938, Article 3, *The International Labour Code*, 1939, Article 899.

[8] Article VIII, Section 5 (b).

report recommending the project after a careful study of the merits of the proposal.[1] There may be cases in which it is one of the major functions of an organization to receive reports concerning prospective national action before such action is taken with a view to affording an opportunity for disinterested evaluation of the probable international effects of the contemplated action.[2]

37. When an international body operates in substantial measure through its own instrumentalities rather than by influencing the policy of its members, it will have a special obligation to compile reports giving the governments of its members full information concerning its activities. In such cases it would not seem disproportionate to provide in the constitution of the organization for the preparation, and preferably also for the publication, of such a report at regular intervals. The UNRRA Agreement, for instance, provides that the Director-General shall make periodic reports to the Central Committee and the Council of the Administration covering the progress of the activities of the Administration.[3] These reports are to be made public except for such portions as the Central Committee may consider it necessary, in the interest of the United Nations, to keep confidential, but if a report affects the interests of a member government in such a way as to render it questionable whether it should be published, such government is to have an opportunity of expressing its views on the question of publication. The right to such an opportunity of expressing views does not appear to amount to a legal right to veto publication. The Fund and the Bank are required to publish annual reports and authorized to publish such other reports as may be desirable to carry out their purposes[4], and the Council of the International Civil Aviation Organization is required to submit annual reports to the Assembly of the Organization.[5] The Charter of the United Nations, in addition to providing for annual reports by the Security Council[6] and the Secretary-General,[7] contemplates arrangements being made for the specialized agencies to furnish regular reports to the Economic and Social Council.[8]

38. In some cases it may be particularly desirable that reports made to or by official international organizations should have unrestricted circulation in the countries affected thereby, and it would seem desirable that the constitutions of all such international organizations should include an undertaking by members that all reports which the organization may issue will be allowed to circulate freely and such provisions in regard to machinery to make this undertaking effective as may be possible. The undertaking might take the form of a provision that no restriction of any kind shall be placed by any government or other authority of any member of the organization on the circulation of any publication issued by the organization nor shall any tax be levied directly or indirectly on the printing, publication, import, distribution or sale of any such publication.

[1] Article III, Section 4 (3) and Article V, Section 7.

[2] See, for instance, the suggestions concerning an international trade authority contained in Alvin Hansen, *America's Role in the World Economy*, New York, 1945, pp. 91–101.

[3] Article IV, paragraph 5.

[4] Full Agreement, Article XII, Section 7; Bank Agreement, Article V, Section 13.

[5] Article 54 (a).

[6] Article 24 (3).

[7] Article 98.

[8] Article 64.

THE CO-ORDINATION OF THE ACTIVITIES OF SPECIALIZED ORGANIZATIONS

39. The creation of specialized international bodies is not an end in itself but a step towards the achievement of a larger objective. It is therefore important that the constitutions of specialized bodies should be so framed as to contribute towards the effective co-ordination of their activities within a general framework of world organization. The problem may be divided into three parts: the relationships *inter se* of co-ordinate organizations of major importance, the relationship of such organizations to some more general co-ordinating structure, and the position in relation to the major organizations of minor bodies dealing with cognate subjects. In respect of all these matters a considerable contribution towards the ultimate development of an integrated system of world organization can be made by the inclusion of appropriate provisions in the constitutions of specialized bodies as they are established and the development of a body of constitutional practice which breathes reality into such provisions and makes good any lacunae in the texts of such instruments.

Collateral Relationships

40. There would appear to be substantial value in the formulation in the constitutions of all specialized bodies of a duty to act in close co-operation with co-ordinate international or regional organizations of States or governments with related responsibilities. A series of such constitutional affirmations of the interdependence of international bodies would be a valuable growing point for their future co-ordination. Important progress in this direction has already been made. Thus the Constitution of the Food and Agriculture Organization provides that "in order to provide for close co-operation between the Organization and other public international organizations with related responsibilities" certain measures shall be taken.[1] The Articles of Agreement of the International Monetary Fund and the International Bank for Reconstruction and Development provide that the Fund and the Bank respectively "shall co-operate within the terms of this Agreement . . . with public international organizations having specialized responsibilities in related fields".[2] The International Labour Organization has adopted the same principle by including in the Declaration of Philadelphia a pledge of full co-operation with such international bodies as may be entrusted with a share of the responsibility for securing the fuller and broader utilization of the world's productive resources and for the promotion of the health, education, and well-being of all peoples.[3] The Agreement concerning the establishment of a European Central Inland Transport Organization provides that E.C.I.T.O. "shall co-operate as may be required with the appropriate authorities and agencies of any one or more of the United Nations and with international organizations".[4] The U.N.E.S.C.O. Constitution envisages co-operation between U.N.E.S.C.O. and other specialized

[1] Article XII.
[2] Fund Agreement, Article X; Bank Agreement, Article V, Section 8.
[3] Section IV.
[4] Article VII (19).

international organizations whose interests and activities are related to its purposes.[1] It would seem desirable that similar provisions should be included in the constitutions of all specialized international organizations as a matter of standard practice.

41. In order to give effect to this principle, agreements defining the distribution of responsibility between organizations with cognate responsibilities and methods of co-operation between them are likely to be necessary, and the maintenance of joint committees may frequently be advisable. The existence of a specific constitutional power to enter into such agreements and maintain such committees, although not strictly necessary, would appear to be calculated to strengthen the forces of integration. Such a provision is contained in the Constitution of the Food and Agriculture Organization which empowers the F.A.O. Conference to enter into agreements with the competent authorities of other public international organizations with related responsibilities defining the distribution of responsibilities and methods of co-operation.[2] The Conference may delegate the power to enter into such agreements to the Executive Committee.[3] The Bretton Woods texts, on the other hand, exclude the power to make arrangements to co-operate with other international organizations from the powers which the Boards of Governors of the Fund and Bank respectively may delegate to the Executive Directors, except in the case of informal arrangements of a temporary or administrative character.[4] The exception may perhaps prove wide enough to avoid any practical inconvenience, but in principle there appears to be little to commend restrictive rules of this character. Arrangements for co-operation between the Fund or the Bank and other international organizations which would involve a modification of the Fund or Bank Agreement may be effected only after amendment of the Agreement by the normal procedure;[5] where such a safeguard exists it would not appear unreasonable to give the executive committee of an international organization full authority to make any necessary arrangements for co-operation with other organizations. The U.N.E.S.C.O. Constitution gives such authority to the Executive Board; it provides that the Director-General may establish effective working relationships with other organizations and establish joint committees and requires the approval of the Executive Board for formal arrangements with other organizations.[6]

42. The Constitution of the Food and Agriculture Organization embodies a further device designed to facilitate co-operation between the specialized organizations. It provides that the F.A.O. Conference may invite any public international organization which has responsibilities related to those of the Organization to appoint a representative who shall participate without the right to vote in its meetings on the conditions prescribed by the Conference.[7] It is clearly desirable that the preoccupations of all the major specialized bodies should receive adequate consideration during the early stages of the

[1] Article XI. [2] Article XII, paragraph 1. [3] Article V, paragraph 3.

[4] Fund Agreement, Article XII, Section 2 (b) (iv); Bank Agreement, Article V, Section 2 (b) (v).

[5] Fund Agreement, Article X; Bank Agreement, Article V, Section 9 (a).

[6] Artcle XI (1).

[7] Article III, paragraph 5. Cf. Article XI (3) of the U.N.E.S.C.O. Constitution which provides that "This Organization may make appropriate arrangements with other intergovernmental organizations for reciprocal representation at meetings".

formulation of policy by each of them, and reciprocal representation at meetings of policy-making bodies by representatives entitled to participate in the discussions on a footing of reasonable equality with national representatives but without voting rights would appear to be calculated to contribute to this end. Where there is no constitutional provision on the subject the same result can sometimes be achieved by the inclusion of appropriate provisions in the rules of procedure of the body concerned. The Rules of Procedure of the UNRRA Council, for instance, provide for the participation in the Council and its committees of observers representing other public international organizations.[1] The term "representative" used in the F.A.O. Constitution would appear to describe more accurately than the term "observer" the functions normally performed by representatives of one international organization accredited to meetings convened by another international organization with which it is maintaining relations of mutual co-operation,[2] but the terminology employed is of relatively secondary importance.

43. Another useful device for ensuring liaison between the specialized international organizations, which should normally be regarded as complementary to rather than a substitute for reciprocal representation at meetings of their policy-making organs at which matters of mutual interest are discussed, is the inclusion in advisory bodies attached to one organization of representatives of, or persons who through serving in a personal capacity are selected in agreement with, another organization. Such arrangements will normally be evolved on an empirical basis, but one recent constituent instrument, the Articles of Agreement of the Bank, provides for the establishment of "an Advisory Council of not less than seven persons selected by the Board of Governors, including representatives of banking, commercial, industrial, labour, and agricultural interests" and specifies that "in those fields where specialized international organizations exist, the members of the Council representative of those fields shall be selected in agreement with such organizations".[3]

44. The Articles of Agreement of the Bank also require the Bank, when making decisions and applications for loans or guarantees relating to matters directly within the competence of any public international organization participated in primarily by members of the Bank, to give consideration to the views and recommendations of such organizations.[4] Provisions of this kind will dovetail in a most valuable manner with such provisions as the clause of the Declaration of Philadelphia affirming the duty of the International Labour Organization to examine and consider all international economic and financial policies and measures in the light of the objectives of the International Labour Organization[5] and the paragraph of the Constitution of the Food and Agriculture Organization empowering the Food and Agriculture Conference to "make recommendations to any public international organization regarding any matter pertaining to the purpose of the

[1] Article VIII.

[2] The term "representatives" is also used in the Standing Orders of the Internationa Labour Conference, as revised in October 1945, Articles 2 (3) (b) and 48 (4) (a).

[3] Article V, Section 6.

[4] Article V, Section 8 (b).

[5] Section II (d), *Official Bulletin of the International Labour Office*, vol. XXVI, No. 1, 1 June 1944, p. 2.

Organization".[1] In some cases it may be appropriate to require an organization not merely to give consideration to the views and recommendations of another organization, but not to act without prior consultation with the other organization or even, in certain cases, not to act except in agreement with it. A precedent for this last type of provision is afforded by the International Convention concerning Economic Statistics of 14 December 1928, which provides that the Committee of Statistical Experts to be established thereunder shall not make any recommendations "in respect of statistics relating to public or private finance (public debt, revenue and expenditure, banking, the money market, stock exchange, &c.), or without the previous agreement of the appropriate international institutions or organizations in respect of statistics relating to agriculture, labour or transport".[2] To generalize regarding the wisdom or otherwise of such provisions is impossible since the answer will necessarily depend in each case on the facts of the particular case.

45. Close co-operation between the specialized organizations will be particularly desirable in respect of such matters as the recruitment, training and conditions of service of staff. The Charter of the United Nations provides that the budgets of the specialized organizations shall be examined by the General Assembly of the United Nations which is to make recommendations to the organizations concerned.[3] Such arrangements should facilitate the attainment of a large measure of uniformity in respect of these matters.[4] The F.A.O. and U.N.E.S.C.O. Constitutions and the Civil Aviation Convention include special provisions on the subject. The F.A.O. Constitution provides that the Director-General may, subject to any decisions of the Conference, enter into agreements with other public international organizations for the maintenance of common services, for common arrangements in regard to recruitment, training, conditions of service and other related matters, and for interchanges of staff.[5] The International Civil Aviation Convention empowers the Council of the International Civil Aviation Organization to enter into agreements with other international organizations for the maintenance of common services and for common arrangements concerning personnel.[6] The U.N.E.S.C.O. Constitution specifies that nothing contained therein shall preclude U.N.E.S.C.O. from entering into special arrangements with the United Nations Organization for common services and staff and for the interchange of personnel.[7] The inclusion of similar provisions in other instruments would help to complete the necessary constitutional foundation for common international civil service standards.

46. There would also appear to be some value in the attribution to the Director of each specialized international body of a constitutional responsibility for ensuring that the officials under his control co-operate fully in the maintenance of close working relations with other bodies with cognate responsibilities. The wartime experience of the Combined Boards has underlined the importance of effective working relationships at the operative

[1] Article IV, paragraph 5.
[2] Hudson, *International Legislation*, vol. IV, p. 2584.
[3] Article 17 (3).
[4] The British Commentary on the Dumbarton Oaks Proposals (Cmd. 6571 of 1944) mentions the establishment of common standards and conditions as the purpose of the suggested review of administrative budgets by the Economic and Social Council.
[5] Article XII (2).
[6] Article 65.
[7] Article VI (6).

level for the success of experiments in the international co-ordination of policy and action and for this reason the inclusion of such a provision, while logically superfluous, would appear likely to be of substantial practical value.

Relationship of Specialized Organizations to General Organization

47. The collateral relations of the various specialized organizations are likely to develop within the framework of the proposed general international organization. The Charter of the United Nations provides that the general international organization will make recommendations for the co-ordination of the policies and activities of the economic, social and other specialized agencies brought into relation with the general Organization in accordance with agreements between such agencies and the general Organization.[1] The constitutions of some of the specialized organizations have anticipated this feature of the Charter. Thus the F.A.O. Constitution provides that the Food and Agriculture Organization shall "constitute a part of any general international organization to which may be entrusted the co-ordination of the activities of international organizations with specialized responsibilities";[2] the Bretton Woods texts provide that the Fund and the Bank respectively shall "co-operate within the terms of this Agreement with any general international organization";[3] the Civil Aviation Convention provides that the International Civil Aviation Organization may, with respect to air matters within its competence directly affecting world security, enter into appropriate arrangements with any general organization set up by the nations of the world to preserve peace.[4] All of these provisions are based on the principle that the relations between the specialized organizations and the general organization will be worked out by agreement. The F.A.O. Constitution provides that arrangements for defining the relations between the Food and Agriculture Organization and the general organization shall be subject to the approval of the F.A.O. Conference; where such arrangements involve modification of the provisions of the Constitution a two-thirds majority of the votes cast is required.[5] The Bretton Woods texts provide that any arrangement for co-operation between the Fund or Bank and the general organization which would involve a modification of any provisions of the Fund or Bank Agreement may be effected only after modification of the Agreement by the normal procedure.[6] The Civil Aviation Convention requires a vote of the Civil Aviation Assembly for arrangements defining the relation of the Civil Aviation Organization to the general organization.[7] The same principle underlies the statement of policy made public by the Governing Body of the International Labour Office on 27 January 1945 which "affirms the desire of the International Labour Organization for association with the general international organization now contemplated on terms which will permit the International Labour Organization, with its tripartite character, to make its best contribution to the general effort of

[1] Article 58.

[2] Article XIII, paragraph 1. Cf. the Agreement concerning the establishment of a European Central Inland Transport Organization which provides that E.C.I.T.O. "shall be related to any general international organization to which may be entrusted the co-ordination of the activities of international organizations with specialized responsibilities" (Article IX.)

[3] Fund Agreement, Article X; Bank Agreement, Article V, Section 8 (a).

[4] Article 64. [5] Article XIII, paragraph 2.

[6] Fund Agreement, Article X; Bank Agreement, Article V, Section 8 (a). [7] Article 64.

the organization of international machinery for the better ordering of a peaceful and prosperous world while retaining for the International Labour Organization the authority essential for the discharge of its responsibilities under its Constitution and the Declaration of Philadelphia". This statement has since been reaffirmed by the resolution concerning the relationship between the I.L.O. and the United Nations adopted by the International Labour Conference at Paris on 3 November 1945.[1] The U.N.E.S.C.O. Constitution provides that U.N.E.S.C.O. "shall be brought into relation with the United Nations Organization, as soon as practicable, as one of the specialized agencies referred to in Article 57 of the Charter of the United Nations", that "this relationship shall be effected through an agreement with the United Nations Organization, under Article 63 of the Charter, which agreement shall be subject to the approval of" the U.N.E.S.C.O. Conference, and that "the agreement shall provide for effective co-operation between the two Organizations in the pursuit of their common purposes and at the same time shall recognize the autonomy of this Organization, within the fields of its competence as defined in this Constitution".[2]

Position of Minor Bodies

48. In order to facilitate the effective integration of the various specialized bodies in a general pattern of world organization it will be necessary to have the work of numerous minor bodies co-ordinated through bodies such as the International Labour Organization, the Food and Agriculture Organization, the suggested general international commodity control organization, and whatever general international authority may be established for questions relating to communications and transit. It would therefore seem desirable that the constitutions of bodies which are likely to co-ordinate the work of other bodies should give them appropriate powers for this purpose. These powers might include both a specific power, such as that conferred by the F.A.O. Constitution, to take other international or regional organizations of States or governments under their general authority on such terms as may be agreed with the competent body of the organization concerned,[3] and specific power to establish such agencies as may be necessary to implement their general purposes and to confer upon such agencies such legal capacity as may be necessary for the satisfactory discharge of the function entrusted to them. The existence of such powers should both facilitate the integration of the numerous nondescript existing official international bodies into some general pattern of international organization and facilitate the creation of the innumerable special purpose bodies which will be required for the discharge of executive and other functions in the future. The technique of the multipartite instrument is a cumbrous method of creating international agencies, and there would be great advantages in the creation of such agencies, whenever possible, by some international decision, such as a charter issued by, or an organic statute adopted by, an international organization with a broader field of authority.[4] The League of Nations created a considerable number of agencies in this manner by instruments

[1] *Official Bulletin of the International Labour Office*, Vol. XXVII. [2] Article XI.
[3] Article XIV.
[4] Cf. International Labour Office, *Intergovernmental Commodity Control Agreements*, 1943, pp. xlv–xlvi.

adopted by the Council or the Assembly; the International Labour Organization has been experimenting along similar lines;[1] and the Agreement constituting the United Nations Relief and Rehabilitation Administration specifically empowers the Administration "to designate or create agencies and to review the activities of agencies so created".[2] The Charter of the United Nations empowers the General Assembly to establish such subsidiary organs as it deems necessary for the performance of its functions,[3] provides that the Organization shall, where appropriate, initiate negotiations among the States concerned for the creation of any new specialized agencies which may be required,[4] and requires the Economic and Social Council to set up commissions in economic and social fields and for the promotion of human rights and such other commissions as may be required for the performance of its functions.[5] Although these provisions are somewhat conservative in their general tenour the powers of the Assembly could be used to effect a substantial improvement in the methods employed for the creation of international bodies, but they will not eliminate the need for the co-ordination of the activities of numerous minor bodies through the principal specialized agencies.

IMMUNITIES AND FACILITIES

49. In addition to attributing legal personality to public international organizations—a subject discussed in another part of this volume—in order to facilitate their legal relations with individuals and corporate bodies, it is also necessary to define their legal status in relation to their member States, and this is normally done by according them immunities comparable to those enjoyed by sovereign States under international law. In addition to such classical immunities as immunity from suit, the inviolability of premises and archives, and exemption from taxation, it is also necessary to accord such organizations the practical facilities necessary for the efficient conduct of their official business.[6] In the light of experience it appears desirable that

[1] See, for instance, the Statute of the International Development Works Committee in *The Constitution and Rules of the International Labour Organization*, and C. Wilfred Jenks, "The Statute of the International Public Works Committee" in *American Journal of International Law*, vol. 38, No. 1, 1939, pp. 160–4.

[2] Article I (1). The power does not appear to have been used.

[3] Article 22. [4] Article 59. [5] Article 68.

[6] See, for instance, the resolution of the Assembly of the League of Nations concerning passports for officials of the League, 15 December 1920, League of Nations, *The Records of the First Assembly*, Plenary Meetings, pp. 557–8; the resolution of the Assembly of the League of Nations concerning the Régime applicable to Aircraft used for communications of importance for the working of the League in times of emergency, 30 September 1930 (*League of Nations Official Journal, Special Supplement No.* 94, *Records of the Eleventh Ordinary Session of the Assembly, Plenary Meetings*, pp. 160–1); the resolution of the Assembly of the League of Nations concerning the Régime of Motor Transport of importance to the working of the League in times of emergency, 30 September 1930 (*ibid.*, pp. 161–2), the correspondence between the International Labour Office and the Swiss Government concerning the Courier Service of the International Labour Office (*Official Bulletin of the International Labour Office*, vol. III, No. 9, 22 March 1921, pp. 3–7); the understanding between the Canadian Government and the International Labour Office concerning Banking and Exchange Transactions, 10–13 October 1941 (*Minutes of the Ninetieth Session of the Governing Body of the International Labour Office*, pp. 47–8), and the UNRRA Council Resolutions relating to Official Correspondence of the Administration, 29 November 1943 (*First Session of the Council of the United Nations Relief and Rehabilitation Administration, Selected Documents*, pp. 64–5), and to Travel facilities for the staff of the Administration, 29 November 1943 (*ibid*, pp. 65–6).

See also League of Nations, *Systematic Survey of the Régime of Communications of Importance to the Working of the League of Nations at Times of Emergency*, Series of League of Nations

the constitutions of all the new international organizations should embody general principles which guarantee effectively the independence of the organization and its agents by the grant of appropriate immunities and ensure that the organization will enjoy all the facilities in regard to communications, exchange arrangements, travel arrangements and similar matters which governments customarily extend to each other to facilitate the conduct of official business. The Charter of the United Nations provides that "the Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes", that "representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization", and that "the General Assembly may make recommendations with a view to determining the details of the application of" these principles "or may propose Conventions to the Members of the United Nations for this purpose".[1] It thus adopts the functional principle as the criterion by which the privileges and immunities to be accorded are to be determined and leaves these to be defined in detail by the General Assembly. The Constitution of the Food and Agriculture Organization of the United Nations,[2] the Articles of Agreement of the International Monetary Fund[3] and the International Bank for Reconstruction and Development[4] and the Agreement concerning the establishment of a European Central Inland Transport Organization,[5] also contain provisions on these subjects which may to some extent serve as precedents. The UNRRA Agreement contains no similar provision and it was therefore found necessary to deal with the

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[*Note continued from previous page*].

Publications, VIII Transit 1934 XIII 6, and C. Wilfred Jenks, *The Headquarters of International Institutions. A Study of their Location and Status*, Royal Institute of International Affairs, London, 1945, pp. 35–53; *Report of the Preparatory Commission of the United Nations*, pp. 60–80.

[1] Article 105. The *Report to the President on the Results of the San Francisco Conference* by the Chairman of the United States delegation contains the following discussion of these provisions:

> "The United Nations, being an organization of all the member States, is clearly not subject to the jurisdiction or control of any one of them and the same will be true for the officials of the organization. The problem will be particularly important in connection with the relationship between the United Nations and the country in which it has its seat. The problem will also exist, however, in any country in which the officials of the United Nations are called upon from time to time to perform official duties. The United States shares the interest of all members in seeing that no State hampers the work of the organization through the imposition of unnecessary local burdens.
>
> "It would have been possible to make the simple statement that all of these officials and representatives would have diplomatic privileges and immunities but it is not necessarily true that these international officials will need precisely the same privileges and immunities as are needed by the diplomatic representatives of individual States. It accordingly seemed better to lay down as a test the necessity of the independent exercise of the functions of the individuals in connection with the organization.
>
> "The provisions of Article 105 relate only to the organization itself, and to its officials, and not to other public international organizations which may be brought into relationship with it. This is true because the statutes or agreements under which these other organizations are set up presumably will provide for the status of their respective officials."
>
> (Department of State Publication 2349, Conference Series 71, pp. 159–60.)

The U.N.E.S.C.O. Constitution, however, provides that "the provisions of Articles 104 and 105 of the Charter of the United Nations Organization concerning the legal status of that organization, its privileges and immunities shall apply in the same way to this Organization" Article XII.

[2] Articles VIII (4) and XV (2).

[3] Article IX.

[4] Article VII.

[5] Article VIII (15), (16) and (17).

matter by the adoption at the First Session of the UNRRA Council of detailed resolutions on the subject recommending appropriate action by governments.[1] Legislation providing for the grant of certain immunities to international organizations and their staffs has recently been enacted in both the United Kingdom and the United States.[2]

FINANCE

50. It is of particular importance that the constitutions of international bodies should make adequate provision for their financing. Adequate and assured financial resources are one of the principal sinews of all government, national or international. Although the assignment to international bodies of revenues under their own control is in principle desirable, and the British proposals for an International Clearing Union contemplated that the suggested Union might afford financial support to other international bodies including a commodity control organization and an international investment board,[3] it now appears probable, in view of the abandonment of the Clearing Union proposals, that the majority of international bodies will continue for some time to come to draw the greater part of their revenues from annual contributions from national governments. Upon this assumption it is of outstanding importance that international bodies should enjoy legal rights in respect of such contributions which assure them a foundation of financial strength adequate for the proper discharge of their responsibilities. The arrangements which are desirable include the adoption of international budgets by a majority vote, the formulation of an explicit obligation to contribute as a matter of legal duty the amounts fixed by majority decision, the fixing of determinate dates on which contributions become due, and such other measures to secure prompt payment as may be possible, and the establishment of some procedure for the recovery, by legal process if necessary, of contributions in default.[4] The formulation of these desiderata is a simple matter; to secure their acceptance is a task of the greatest difficulty. National legislatures remain attached to the power of the purse and to the control of the policy of international bodies which it enables them to retain. It is therefore most improbable that a satisfactory detailed code of financial obligations could to-day secure acceptance as part of the constitution of

[1] Resolutions No. 32, 34, and 36 of the First Session of the Council.

[2] Diplomatic Privileges (Extension) Act, 1944, 7 & 8 Geo. VI, ch. 44; Diplomatic Privileges (U.N.R.R.A.) Order-in-Council, 1945, Statutory Rules and Orders, 1945, No. 79; Diplomatic Privileges (U.N.I.O., the Refugees Committee, and E.A.C.) Order-in-Council, 1945, Statutory Rules and Orders, 1945, No. 84. As to the United States see International Organizations Immunities Act, 1945, Public Law 291, 79th Congress. While the existence of legislative provision for international immunities is a welcome step forward, the principle of nationality discrimination in respect of the extent of international immunities adopted in the Diplomatic Privileges (Extension) Act runs counter to the weight of opinion among international lawyers and is entirely in consistent with the function and purpose of such immunities; see, for instance, Sir Cecil J. B. Hurst, "Diplomatic Immunities—Modern Developments", in *The British Year Book of International Law*, vol. X, 1929, p. 10; Ake Hammarskjold, "Les Immunités des Personnes Investies de Fonctions Internationales", in *Hague Recueil*, 1936, vol. 56, pp. 204–5; and the resolution on the subject adopted by the Institut de Droit International in 1924, Article 2, *Annuaire de l'Institut de Droit International*, 1924, vol. 31, p. 179.

[3] *Proposals for an International Clearing Union*, Cmd. 6437 of 1943, paragraph 39.

[4] The subject is discussed more fully in C. Wilfred Jenks, "Some Legal Aspects of the Financing of International Institutions", in *Transactions of the Grotius Society*, vol. XXVIII, pp. 87–132.

any international body, and in these circumstances it may be the part of wisdom to frame the financial provisions of such constitutions in language of the most general character which will allow of the gradual development in the future of an adequate body of law concerning the financing of international institutions. The Charter of the United Nations proceeds upon this principle and provides in general language that the General Assembly shall consider and approve the budget of the Organization and that the expenses of the Organization shall be borne by the Members as apportioned by the General Assembly,[1] without attempting to define in further detail the financial obligations of Members.

51. This conclusion, although it appears to be irresistible, can be acquiesced in only with the greatest reluctance, and suggests two further conclusions in regard to immediate policy. On the one hand it is important to have regard to the need for the future growth of an adequate body of law in respect of this matter when framing the financial provisions of the constitutions of new international bodies, and to avoid including in such constitutions provisions which may make the development of such a body of law more difficult. Provisions which make the financial obligations of governments conditional upon action to be taken in accordance with national constitutional procedures must be regarded as being seriously objectionable on this ground. No international body can be operated efficiently if the decisions concerning financial questions taken by its competent organs are regarded, not as decisions which constitute an international obligation for the countries concerned, but as provisional findings which are subject to review in each country in the discretion of the national legislature or other appropriating authority. Action through national constitutional procedures may frequently be necessary to implement the obligations resulting from international decisions concerning international budgets, but unless such decisions are recognized as creating international obligations the fulfilment of which is required by law and honour alike, there can, in a world in which international bodies do not dispose of adequate financial resources under their own control, be no effective international organization whatsoever. It is therefore most unfortunate that the UNRRA Agreement, unlike the Covenant of the League of Nations, qualifies the obligation of each member government to contribute the share of administrative expenses determined by the UNRRA Council with the phrase "subject to the requirements of its constitutional procedure".[2] Under this formula there appears to be an obligation upon each member government, but that obligation is not regarded as binding the State and the obligation of the government is therefore limited to what it can do while respecting the requirements of the national constitutional procedure for the appropriation of funds. The formula is preferable to that used in the UNRRA Agreement with reference to supplies and resources for relief purposes which each government undertakes to contribute "only in so far as its appropriate constitutional bodies shall authorize"[3] and on the understanding that "the amount and character of the contributions of each member government . . . will be determined from time to time by its appropriate constitutional bodies".[4] Under this supplies and resources formula no obligation having any legal content rests

[1] Article 17. [2] Article VI. [3] Article V (1). [4] Article V (1).

upon either the State or the government. The formula used in the UNRRA Agreement in regard to administrative expenses is, however, far from satisfactory, and it is to be hoped that it will not be regarded as a model for further instruments. The UNRRA Agreement is an agreement between governments which was entered into by certain countries, notably the United States, as an executive agreement not requiring ratification by the constitutional procedure applicable to treaties. In such a case the use of a formula under which the government alone and not the State is bound by the financial decisions of the international body concerned, and in which the obligation of the government must therefore be qualified by some reference to the requirements of national constitutional procedure, though no less liable to be a cause of practical difficulty than in other cases, is understandable and, it may reasonably be argued, almost inevitable. The position is different in the case of instruments which create obligations binding upon States and have been accepted by whatever procedure is necessary for that purpose. In such cases the proper course would appear to be for each government to seek prior to its acceptance of the instrument whatever constitutional authority may be necessary to enable it to accept on behalf of the State an international obligation to regard the financial decisions of the international body as binding upon it. Such an obligation does not involve any transfer from the legislature to the executive of the constitutional power and responsibility to take the measures necessary for its implementation. It does involve the recognition of an international obligation to take the measures necessary to implement financial decisions reached in agreement with representatives of other countries. Unless this degree of delegation of responsibility to international bodies is acceptable the financial arrangements of such bodies will continue to be so precarious as to make the intelligent and economical organization of their work virtually impossible, and the scope for their development into effective instruments of world organization will be severely limited. In reviewing the matter it must always be remembered that international bodies are not something external to governments, but are in the main controlled by governments, and that it is the responsibility of each State under international law so to organize its constitutional system that the operation of democratic processes does not prevent the government from acting effectively in international relationships on behalf of the State as a whole. Under the parliamentary system this result is secured by the device of responsible government; under the congressional or presidential system the solution may perhaps be found by requiring senatorial or congressional approval of the appointment of the presidential nominee entitled to participate in the vote which will create a financial obligation binding upon his country. The details of the solutions adopted in particular countries are relatively unimportant, but if international organization is to be made a reality effective means must be found to bridge the gap between international obligation and national constitutional procedures.

Initial Financing

52. The second conclusion which energes in regard to immediate policy respecting the financing of international institutions is that, in view of the difficulty of tightening up the arrangements governing annual contributions

by governments, it is of special importance to make adequate provision for substantial initial contributions to operating and reserve funds. Most of the current proposals involving large-scale financial transactions for operational purposes, such as the Fund and Bank schemes, involved such initial contributions.[1] Such contributions will be equally essential if international commodity control arrangements involving large-scale buffer stock operations should be established. They may be less essential for bodies which are primarily organs for co-ordinating and stimulating national policies in such fields as food and agriculture, health and education, but they are desirable in the case of all international organizations with responsibilities of major significance. Where the constitution of a fund is the essence of a proposal for the establishment of a new international body, as in the cases of the International Monetary Fund and the International Bank for Reconstruction and Development, the arrangements regarding the fund will form the core of the proposed constitutional structure. Where the purpose of an initial fund is mainly to furnish financial resources to a body which is not primarily engaged in financial transactions, it will normally be undesirable to give the rigidity of constitutional provisions to the arrangements governing the fund, and it may often be preferable to embody these arrangements in some instrument subject to modification more readily than the constitution.[2]

Suspension of Voting Rights of States in Arrears

53. Widespread acceptance has recently been secured by the principle that the voting rights of States which are in arrears in the payment of their contributions to international organizations should be suspended until their contributions have been paid in full. The Charter of the United Nations provides that a Member which is in arrears in the payment of its financial contributions to the Organization shall have no vote in the General Assembly if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years, but allows the General Assembly to permit such a Member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the Member.[3] The only relevant provision at present contained in the constitution of a specialized agency occurs in the Civil Aviation Convention which empowers the Assembly to suspend the voting power in the Assembly and in the Council of any contracting State that fails to discharge within a reasonable period its financial obligations to the Organization,[4] but the matter has also been raised in other cases. It could probably be dealt with in certain cases by the inclusion in the financial regulations of international organizations of provisions limiting the right of

[1] Fund Agreement, Article III, Section 3, and Article XXII, Section 2 (d); Bank Agreement, Article II, Sections 3, 5, 7, and 8, and Article XI, Section 2 (d).

[2] Cf. Annex II of the Food Constitution which provides that the unspent balance of contributions for the first financial year shall constitute the nucleus of a capital fund; Cmd. 6590 of 1945, p. 9.

[3] Article 19.

[4] Article 62. The draft proposals for an Educational and Cultural Organization of the United Nations provided that the right of a Member to vote in the Conference and the eligibility of its nationals to be elected to the Executive Board shall be automatically suspended for any Member that fails for two successive years to meet its financial obligations to the proposed Organization, with the proviso that the Conference may in exceptional circumstances waive such suspension, but there is no equivalent provision in the text of the U.N.E.S.C.O.Constitution as adopted. The Constitution of the International Labour Organization, Instrument of Amendment, 1945, follows the formula contained in the Charter of the United Nations.

States in default to vote on financial questions or to make or vote upon proposals involving expenditure.

ARRANGEMENTS FOR INTERPRETATION

54. It is desirable that the constitutions of all international bodies should vest in an appropriate international court or arbitral tribunal jurisdiction over questions involving the interpretation of the constitution or of instruments adopted thereunder and the rights and obligations of Member States. For questions of major importance this tribunal should normally be the International Court of Justice. It is, however, undesirable that it should be impossible to secure a final determination of matters of minor importance without reference to the International Court,[1] and it is therefore to be hoped that the jurisdictional clauses of the constitutions of new international bodies will permit of some flexibility of procedure while reserving final jurisdiction in respect of matters of substantial importance to the International Court. There are considerable advantages in the expedient of including in a constitution a provision empowering some organ of the body concerned to make rules providing for the reference of any questions or disputes which may arise to an appropriate international court or arbitral in the manner prescribed by such rules. This course has been followed in the Constitution of the Food and Agriculture Organization of the United Nations.[2] The procedure for the reference of questions to the International Court will have to be compatible with the applicable provisions of the Charter of the United Nations and the Statute of the Court. The Statute authorizes the International Court to give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request,[3] and the Charter provides that "the General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question" and that "other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities".[4] While the International Court of Justice should normally be given jurisdiction over questions involving the interpretation of the constitution of a specialized international organization, there may be cases in which the technical nature of the provisions of such a constitution makes it preferable to vest such jurisdiction in some other body. The cases of the International Monetary Fund and the International Bank for Reconstruction and Development afford a typical illustration. The Articles of the Agreement of both the Fund and the Bank provide that any question of interpretation of their provisions shall be submitted to the Executive Directors for their decision and permit of an appeal to the Board of Governors, whose decision is final; pending the result of such reference to the Board the Fund or Bank may, so far as it deems necessary,

[1] There has been some controversy on the question whether the wording of Article 37 of the Constitution of the International Labour Organization precludes recourse to an arbitral tribunal in cases of insufficient importance to warrant reference to the Permanent Court; cf. International Labour Conference, Twenty-Seventh Session, Report IV (1), *The Relationship of the I.L.O. to other International Bodies*, pp. 107–8.

[2] Article XVII. Cf. Article XIV (2) of the U.N.E.S.C.O. Constitution.

[3] Article 65.

[4] Article 96.

act on the basis of the decision of the Executive Director.[1] These arrangements would clearly be inappropriate in the event of disagreement between the Fund or Bank and a former member, or between the Fund or Bank and any member during the liquidation of the Fund or the permanent suspension of the Bank. Such disagreements are to be submitted to a tribunal of three arbitrators, one appointed by the Fund or Bank and one by the country concerned, the third being an umpire who, unless the parties otherwise agree, is to be appointed by the President of the Permanent Court of International Justice or such other authority as may have been prescribed by regulation adopted by the Fund or Bank. The umpire is to have full power to settle all questions of procedure in any case where the parties are in disagreement with respect thereto.[2] The Civil Aviation Convention provides that any disagreement between two or more member States relating to the interpretation or application of the Convention and its annexes shall be determined by the Council of the International Civil Aviation Organization, but permits any member State to appeal within sixty days from the decision of the Council to an *ad hoc* arbitral tribunal agreed upon with the other parties to the dispute or to the Permanent Court of International Justice.[3] Special rules are laid down for the nomination of arbitrators and an umpire in cases in which one of the parties to a dispute has not adhered to the Statute of the Court and the parties cannot agree on the choice of the arbitral tribunal.[4] The existence of such a provision for an appeal to the Court represents, it is submitted, a distinct improvement over the Bretton Woods formula. It may be that the right of appeal should be limited to disagreements involving important points of law, but in respect of such matters there is an extremely strong case for allowing recourse to the Permanent Court in the last resort as a safeguard for the application of reasonably uniform principles of interpretation to the constitutions of the different international bodies in all cases in which there are no special considerations of overriding importance to be taken into account.

AMENDMENT

55. However flexible a constitution may be and whatever may be the scope which it allows for growth and change, the probability that it will at some time require amendment in some unanticipated respect must be envisaged. It is therefore desirable that the constitutions of all the new international bodies should permit of their amendment under conditions the fulfilment of which does not involve difficulties which are virtually insuperable in practice. The Covenant[5] and the Constitution of the International Labour Organization[6] both prescribed procedures for their amendment, but in both cases the conditions prescribed were in practice virtually impossible to fulfil, except in respect of uncontroversial amendments and even in such cases only subject to long delay.[7] The Statute of the Permanent Court of International Justice did not prescribe any procedure of amendment, with

[1] Fund Agreement, Article XVIII (a) and (b); Bank Agreement, Article IX (a) and (b).
[2] Fund Agreement, Article XVIII (c); Bank Agreement, Article IX (c).
[3] Article 84. [4] Article 85. [5] Article 26. [6] Article 36.
[7] Concerning the amendment of the Constitution of the I.L.O. see International Labour Conference, Twenty-sixth Session, Report I, *Future Policy, Programme and Status of the I.L.O.*, p. 143, and Twenty-Seventh Session, Report IV (1), *The Relationship of the I.L.O. to other International Bodies*, pp. 108–10.

the result that serious difficulties were encountered, and there was prolonged delay, in bringing into force the 1929 amendments to the Statute.[1] The Charter of the United Nations provides that amendments shall come into force for all Members of the Organization when they have been adopted by a vote of two-thirds of the members of the General Assembly, or of a general conference for reviewing the Charter convened by the General Assembly, and have been ratified in accordance with their respective constitutional processes by two-thirds of the Members of the United Nations including all the permanent members of the Security Council. The distinction drawn by these provisions between the permanent members of the Security Council and the other Members of the United Nations is unlikely to be acceptable to the smaller States in the case of organizations dealing with matters other than security, and it is significant that a committee report approved by the San Francisco Conference points out that a Member would not be bound "to remain in the Organization if its rights and obligations as such were changed by Charter amendment in which it has not concurred and which it finds itself unable to accept, or if an amendment duly accepted by the necessary majority in the Assembly or in a general conference fails to secure the ratification necessary to bring such amendment into effect". In the UNRRA Agreement an attempt has been made to avoid these difficulties by distinguishing between: amendments involving new obligations for governments, which require the approval of the UNRRA Council by a two-thirds vote, but take effect for each member government only on acceptance by it; amendments involving the modification of the basic structure of UNRRA but not involving new obligations for individual governments, which take effect on adoption by the UNRRA Council by a two-thirds vote, including the votes of all the members of the Central Committee (i.e. the representatives of Canada, China, France, Great Britain, U.S.S.R., and United States);[2] and other amendments, which take effect on adoption by the Council by a two-thirds vote.[3] The Constitution of the Food and Agriculture Organization embodies the same principle in a modified form; amendments thereto involving new obligations for member nations require the approval of the F.A.O. Conference by a vote concurred in by a two-thirds majority of all the members of the Conference and take effect on acceptance by two-thirds of the member nations for each member nation accepting the amendment and thereafter for each remaining member nation on acceptance by it; other amendments take effect on adoption by the F.A.O. Conference by a vote concurred in by a two-thirds majority of all the Members of the Conference.[4] The obvious weakness of this system is that under it an amendment may be in force for some members of an organization without being binding upon the other members, but, upon the assumptions that it is impossible to provide

[1] Manley O. Hudson, *The Permanent Court of International Justice*, 1920–42, New York, 1943, pp. 130–41.

[2] Article III of the UNRRA Agreement was amended by this procedure at the Third Session of the UNRRA Council in order to include Canada and France in the membership of the Central Committee.

[3] Article VIII.

[4] Article XX. Another variant of the same system has been adopted in the agreement concerning the establishment of an European Central Inland Transport Organization which provides that after the expiration of two years from the date of signature its provisions may be amended, suspended or terminated by a two-thirds majority of the Council, provided that no alteration shall be made therein so as to extend the obligations or financial liability of any Member Government without that Government's consent.

that an amendment will be binding upon a great power which dissents therefrom, and that in many cases the smaller States will be unwilling to accept rules concerning constitutional amendments which differentiate between great powers and other States, this solution may be a lesser evil than either allowing dissenting States to veto the entry into force of an amendment for a substantial majority or requiring dissenting States to opt between acquiescence in the amendment and withdrawal from the Organization. The Articles of Agreement of the International Monetary Fund and of the International Bank for Reconstruction and Development deal with the problem of amendment in a rather different manner. In the Fund and the Bank voting power is related to the quotas and subscriptions of members; amendments must be approved in the first instance by the Board of Governors; when a proposed amendment has been so approved all members are to be asked by circular letter or telegram whether they accept it, and when three-fifths of the members, having four-fifths of the total voting power, have accepted the proposed amendment, the Fund or Bank, as the case may be, is to certify the fact by a formal communication addressed to all members;[1] amendments enter into force for all members three months after the date of the formal communication unless a shorter period is specified in the circular letter or telegram.[2] In certain exceptional cases acceptance by all members is required: in the case of the Fund, this is necessary for any amendment modifying (i) the right to withdraw from the Fund, (ii) the provision that no change in a member's quota shall be made without its consent, or (iii) the provision that no change may be made in the par value of a member's currency except on the proposal of that member;[3] in the case of the Bank, acceptance by all members is necessary for any amendment modifying (i) the right to withdraw from the Bank, (ii) the right to a reasonable opportunity to subscribe a proportion of any increase of the authorized capital stock of the Bank equivalent to the proportion which the stock theretofore subscribed by the member concerned bears to the total capital stock of the Bank, or (iii) the limitation of liability on shares of the Bank to the unpaid portion of the issue price of the shares.[4] Similar arrangements may be appropriate in the case of other organizations which operate on the basis of quota voting. The Civil Aviation Convention provides that any proposed amendment must be approved by a two-thirds majority of the Assembly and shall then come into force in respect of States which have ratified such amendment when ratified by the number of contracting States, not being less than two-thirds of the total number of contracting States, specified by the Assembly;[5] if in its opinion the amendment is of such a nature as to justify this course, the Assembly in its resolution recommending adoption may provide that any State which has not ratified within a specified period after the amendment has come into force shall thereupon cease to be a member of the Organization and a party to the Convention.[6] Amendments to the annexes to the Convention, which embody technical rules concerning aviation, may be adopted by the Council by a two-thirds vote of those present and are then to be submitted by the Council to each contracting State; an amendment becomes effective within three months after

[1] Fund Agreement, Article XVII (a); Bank Agreement, Article VIII (a).
[2] Fund Agreement, Article XVII (c); Bank Agreement, Article VIII (c).
[3] Article XVII (b). [4] Article VIII (b). [5] Article 94 (a). [6] Article 94 (b).

its submission to the contracting States or at the end of such longer period of time as the Council may prescribe, unless in the meantime a majority of the contracting States register their disapproval with the Council.[1] These arrangements do not represent any substantial advance upon, and in respect of the annexes compare unfavourably with, the provisions of the Convention relating to the Regulation of Aerial Navigation of 13 October 1919, in virtue of which the International Commission for Air Navigation had power to modify the technical annexes to the Convention by a special majority and to submit for the acceptance of the contracting States protocols for the amendment of the Convention itself.[2] Particularly flexible rules concerning amendments are contained in the U.N.E.S.C.O. Constitution which provides that amendments shall become effective upon receiving the approval of the U.N.E.S.C.O. Conference by a two-thirds majority, "provided, however, that those amendments which involve fundamental alterations in the aims of the Organization, or new obligations for the Member States shall require subsequent acceptance on the part of two-thirds of the Member States before they come into force".[3] The Constitution of the I.L.O. Instrument of Amendment, 1945, provides that amendments to the Constitution adopted by the Conference by a majority of two-thirds of the votes cast by the delegates present shall take effect when ratified or accepted by two-thirds of the Members of the Organization including five of the eight Members which are represented on the Governing Body as Members of chief industrial importance.[4] It would seem desirable to include in all future international constituent instruments provisions laying down an appropriate procedure for their modification; such provisions should relax the requirements to be fulfilled for the coming into force of an amendment sufficiently to avoid the danger of undue rigidity; but while the amendment of the constitution of an international organization should not be impossibly difficult, it is equally undesirable that such a constitution should be subject to amendment by a snap vote, that an important amendment should come into force against the opposition of a large and powerful minority, or that an international organization should get into the habit of amending its constitution lightheartedly. These conflicting considerations must all be weighed in endeavouring to strike the balance between undue rigidity and excessive flexibility most appropriate to the requirements of the individual case.

SUPERSESSION OF EARLIER ORGANIZATIONS

56. It may sometimes be desirable that an existing international body should be superseded or absorbed when a new body is created. It has been suggested, for instance, that the proposed Permanent Organization for Food and Agriculture should absorb the International Institute of Agriculture, and other similar cases may arise[5]. In such cases it will be necessary to consider the procedure to be followed. In general it would seem preferable to liquidate

[1] Article 90. [2] Article 34. [3] Article XIII. [4] Article 4.

[5] E.g. the U.N.E.S.C.O. Constitution provides that "Whenever the General Conference of this Organization and the competent authorities of any other specialized intergovernmental organizations or agencies whose purposes and functions lie within the competence of this Organization deem it desirable to effect a transfer of their resources and activities to this Organization, the Director-General, subject to the approval of the Conference, may enter into mutually acceptable arrangements for this purpose". Article IX (2).

the affairs of the body to be superseded or absorbed through its own machinery. Where the instrument constituting the body in question contains provisions defining a procedure for its dissolution, or for the modification of its statutes, the case for adhering to the procedure provided for in that instrument is particularly strong. Even where no such procedure is provided for, however, it would seem desirable to act through the machinery of the old body whenever that body can be regarded as having acquired a life of its own. It is by means of such action that provision can most appropriately be made for the transfer of functions, powers, rights, and duties, and of records and other property, in a manner which will not raise any question regarding the validity of the action taken. This approach does not preclude the inclusion in the constitution of the new body of provisions whereby the members thereof pledge themselves to joint action to secure, through the machinery of the old body, the dissolution of that body, or such lesser modification of its status, organization or powers as may be desired. It is, however, preferable that provisions designed for this purpose should be expressed as transitory provisions rather than included in the body of the instrument. Whenever such transitory provisions of the constituent instrument of a new body contemplate the dissolution of a body to which functions, powers, rights or duties have been entrusted by an international instrument other than the constituent instrument of the body to be dissolved,[1] it is desirable that they should embody an undertaking whereby members of the body being created agree to the transfer thereto of the functions, powers, rights, and duties vested in the old body by instruments to which they are parties. Failing such action the continued execution of such instruments may be prevented or impeded when the old body ceases to exist, and it is the consent of the individual parties to the instruments conferring functions, powers, rights or duties, rather than that of the old body, which is necessary in order to avoid this result.[2] There may of course be cases in which, for political or practical reasons, it is impossible to liquidate the affairs of the body to be superseded and absorbed through its own constitutional machinery. Such cases will always present problems of considerable difficulty concerning which it would be foolhardy to attempt to generalize.

PROVISION FOR WINDING-UP

57. When the functions for the discharge of which an international body is created are of an essentially temporary character, elementary prudence would appear to require the inclusion in its constitution of provisions concerning the procedure for its dissolution and the disposal of its assets. In the absence of such a provision there may be considerable doubt concerning the conditions to be fulfilled in order that a body may be validly dissolved and proper title to any assets given. There is no provision of this kind in the Agreement constituting the United Nations Relief and Rehabilitation Administration. Even in the case of organizations which are designed to be

[1] E.g., the powers listed in League of Nations, *Powers and Duties Attributed to the League of Nations by International Treaties*, League Document C. 3. M. 3., 1944, V.

[2] On the whole question see International Labour Conference, Twenty-Seventh Session, Report IV (1), Matters Arising out of the Work of the Constitutional Committee, Part I, The Relationship of the I.L.O. to Other International Bodies, Chapter III, "The Problems Involved in the Separation of the I.L.O. from the League of Nations", pp. 77–123.

permanent in character the case for dealing with these matters in the instrument constituting them is a strong one, except in any cases in which there is an overriding political reason for emphasizing the intended permanence of the organization, such as admittedly exists in the case of the United Nations Organization in view of its responsibility for peace and security. Such questions may well give rise to considerable difficulty in respect of the League of Nations, the International Institute of Agriculture, the International Commission for Air Navigation, and perhaps the International Office of Public Health. The inclusion of appropriate provisions on these subjects is particularly necessary in cases in which substantial funds are to be held under an instrument. There are important indications that this is now widely recognized. The Articles of Agreement of the International Monetary Fund contain detailed provisions concerning the liquidation of the Fund[1] and the Articles of Agreement of the International Bank for Reconstruction and Development lay down the rules to be followed for the settlement of the obligations of the Bank in the event of the suspension of its operations.[2] It would seem desirable to include similar provisions in the constitutions of any further international organizations to which substantial funds may be entrusted.[3]

CUSTODY OF ORIGINAL TEXTS OF CONSTITUTIONS

58. It is a tradition of diplomatic practice that the custody of the original texts of international instruments is entrusted to the government on the territory of which they are signed. The development of permanent international institutions has resulted in a modification of this practice in respect of instruments negotiated under the auspices of such organizations. The original texts of instruments negotiated under the auspices of the League of Nations, for instance, were normally deposited in the archives of the League. In the case of the instruments adopted at the International Conferences of American States the original texts were normally deposited in the archives of the government acting as host to the Conference, but the Pan-American Union was frequently made responsible for receiving instruments of ratification and notices of denunciation; the Executive Committee on Post-War Problems of the Governing Board of the Pan-American Union has recently recommended that these arrangements should be rationalized by making the Pan-American Union the depository of instruments signed at Inter-American Conferences and making it responsible for sending certified copies to governments as well as for receiving instruments of ratification.[4] Similar arrangements will doubtless be adopted in respect of instruments negotiated under the auspices of the various international organizations now being established. The case for entrusting to international custody the original texts of the constituent instruments of such organizations would

[1] Article XVI, Section 2, and Schedule E. [2] Article VI, Section 5.

[3] The less-detailed provisions of the Statutes of the Bank for International Settlements, the (unratified) Convention for the Creation of an International Mortgage Credit Company of 21 May 1931, and the Organic Statute of the Greek Refugee Settlement Commission of 29 September 1923 may also be found suggestive.

[4] *Pan-American Post-War Organization*, Observations and Suggestions of the Executive Committee on Post-War Problems of the Governing Board of the Pan-American Union, Pan-American Union, Washington, 1944, pp. 9 *et seq.*

appear to be particularly strong. Such original texts should clearly be regarded as international property, and it is as inappropriate that they should be entrusted to the custody of a single government as it would be that the original text of the Constitution of the United States should be regarded as the property of the State of Pennsylvania. In recognition of this principle the Constitution of the Food and Agriculture Organization of the United Nations provides that the original text thereof shall be deposited in the archives of the Food and Agriculture Organization.[1] The inclusion of a similar provision in the International Civil Aviation Convention was contemplated at one stage of the International Civil Aviation Conference, but the text as adopted provides for deposit in the archives of the Government of the United States in the traditional manner.[2] The Interim Agreement establishing the Preparatory Commission of the United Nations provided that the original thereof should be transferred to the Executive Secretary of the Preparatory Commission on his appointment, but no similar provision was contained in the Charter itself, the original of which is to be deposited in the archives of the Government of the United States of America.[3] The other recent instruments follow established practice. The Articles of Agreement of the Fund and of the Bank, for instance, as drafted at Bretton Woods, both provide that they shall be signed "in a single copy which shall remain deposited in the archives of the Government of the United States of America, which shall transmit certified copies" to all governments whose names are set forth in the Schedules to the Articles of Agreement and to all governments [*sic*] subsequently admitted to membership of the Fund or the Bank in accordance with the relevant provisions of the Fund and Bank Agreements respectively.[4] What, however, is to be done if the Fund or the Bank Agreement has been amended by the procedure for which it provides prior to the admission of some new member? In such a case the communication of a certified copy of the text currently in force by the Fund or the Bank would appear to be more appropriate than the communication of a certified copy of the original text by an individual government entrusted with the custody thereof. It is reasonable to hope that in future international constitutional instruments the precedent of the F.A.O. Constitution will be followed and provision made for the custody of the original texts thereof to be entrusted either to the international organization established thereby or to the Secretary-General of the United Nations.[5]

CONCLUSION

59. An effective system of international organization cannot be achieved by a few dramatic decisions. International institutions will necessarily evolve slowly; the loyalties necessary to make them solid realities will evolve still more slowly. Institutional development is primarily the responsibility of statesmanship; it must be guided and controlled by a true appreciation of political forces; but it must be inspired by a teleological constitutionalism, dynamic in outlook, based on a scholarly grasp of the institutional needs

[1] Signature Clause. [2] Signature Clause. [3] Article III. [4] Signature Clause.

[5] The Constitution of the International Labour Organization, Instrument of Amendment, 1945, provides for the authentication of three original copies, one of which is to be deposited in the archives of the International Labour Office, one with the Secretary-General of the League of Nations, and one with the Secretary-General of the United Nations. Article 5.

of a rapidly evolving society, and sustained by a keen awareness of the institutional techniques available to meet those needs. Therein lies the responsibility and the opportunity of the international lawyer in the present stage of the development of international institutions. The greatest of legal traditions is still to be created; its texture will be largely determined by the quality of the craftsmanship which international lawyers place at the disposal of statesmen during the next generation. The scholarly formulation of the juristic concepts of a law of nations based on the interdependence of States[1] and imbued with the social objectives of the United Nations as set forth in the Declaration of Philadelphia;[2] the full exploitation of the rich resources represented by the general principles of law recognized by civilized nations;[3] the continued growth of the international judicial process and the vigorous development of the law by statesmanlike judicial decision; the progressive but systematic improvement of the technique of international legislation by means of the multipartite instrument;[4] the development of an adequate *corpus* of international legislation embracing the wide range of social, economic, and technical problems which require international regulation under modern conditions; the creation of new international organizations operating on the basis of well-conceived constituent instruments of the requisite suppleness and strength; the intensive development on constructive lines of the constitutional practice of international organizations: all these have their part to play in the contribution of international law to the peace, welfare, and good government of the world community. The relative importance of these parts will, however, necessarily vary. Judicial exposition of the law by international tribunals could play a decisive role in strengthening the legal foundations of international society,[5] but the scope for the development of the international judicial process, while not subject to any narrow technical limitations,[6] is in practice severely limited by political factors. In these circumstances the greatest scope for decisive steps forward in the development of an international legal order lies in the fields of international legislation, of international constitution making, and of the evolution of the constitutional practice of international organizations. Happily there is now available a body of experience in these fields which, incomplete as it may be and ill-digested as we may have allowed it to remain, is adequate for charting the path of future progress along boldly constructive lines.

[1] Cf. Lorimer, *The Institutes of the Law of Nations*, Edinburgh, 1884, vol. I, pp. 139–40 and 445–6, and C. Van Vollenhoven, *The Law of Peace*.

[2] International Labour Office, *Official Bulletin*, vol. XXVI, No. 1, 1 June 1944, pp. 1 to 3.

[3] Cf. Lauterpacht, *Private Law Sources and Analogies of International Law*, London, 1927.

[4] Cf. C. Wilfred Jenks, "The Need for an International Legislative Drafting Bureau", in *American Journal of International Law*, vol. 39, 1945.

[5] Cf. H. Lauterpacht, *The Development of International Law by the Permanent Court of International Justice*, London, 1934.

[6] Cf. H. Lauterpacht, *The Function of Law in the International Community*, Oxford, 1933; H. Kelsen, *Law and Peace in International Relations*, Cambridge, Mass., 1942, and *Peace Through Law*, Chapel Hill, 1944.

SOME ASPECTS OF MODERN CONTRABAND CONTROL AND THE LAW OF PRIZE

By G. G. FITZMAURICE

I

THE term contraband control is here employed to denote the aggregate of the techniques whereby a belligerent in a position to enforce such control by naval action seeks to prevent supplies from overseas reaching his enemy.[1] Of these techniques there are a number and it will only be possible to treat of the three principal ones, and of these only in part, i.e. in so far as they present questions of law which are either novel or as yet unresolved, or alternatively depend on legal considerations the importance of which may not have been fully realized.

The main technique of contraband control is and always must be the interception of ships at sea, their diversion into port,[2] the examination of their cargoes, and the seizure and placing in Prize (either immediately or after further inquiries) of any consignments suspected on reasonable grounds of having an enemy destination—to be eventually followed either by their final condemnation as prize by the Prize Court, or by their release if the case against them cannot be sustained. It is not, however, proposed here, except incidentally, to treat of the various grounds on which a ship or consignments carried by her can properly be seized as Prize. This is a vast and many branched subject,[3] any single part of which would require a paper to itself, even to be dealt with in outline. So far as seizures go, therefore, it is proposed to treat only of the legal aspects of certain matters which, though in a sense of a procedural character, nevertheless have a very great, even a paramount, practical importance for the efficiency of contraband control. With regard to the other two main techniques of contraband control, namely, "navicerting" and "rationing" it will be possible to give their legal aspects fairly full treatment.

II

The points which it is proposed to deal with under the head of the interception and diversion of ships and the examination and seizure of their cargoes can conveniently be introduced by noticing the fact that the naval or blockade aspect of economic warfare has attracted comparatively little

[1] No attempt is made here to deal with the general "blockade" of the enemy, e.g., such matters as the seizure of enemy exports, the denial of financial resources to the enemy, &c. Still less is it possible to deal with the wider aspects of "economic warfare" such as the bombing of enemy industry, the organization of sabotage in enemy territory, &c.

[2] The legitimacy of diversion into port for examination was established in the last war and it is not proposed to discuss it here, although the present war has raised a number of questions of considerable legal interest in connexion with this practice. In many cases actual diversion is not necessary, because vessels prefer to call voluntarily at a contraband control base and arrangements are made with shipping companies accordingly.

[3] Even if, as will be the case in this paper, the matter be confined to the seizure of goods only, not ships, a full treatment would require discussion of such topics as "continuous voyage", "produits similaires", "conditional contraband", "enemy character", "infection" and many others.

attention in this war as compared with the last, and by suggesting the probable reasons for this. The last war occurred at the end of an interval during which, apart from the limited number of cases that arose during the Crimean War, this country had not been involved in major naval operations against commerce for about a century. The law of Prize stood therefore virtually where it was left by Lord Stowell at the end of the Napoleonic wars. In the meantime, enormous changes had occurred both in the field of international commerce and in methods of warfare, changes not merely of scale and degree, but of kind. With a few exceptions, the cases decided in such contests as the Crimean War, the American Civil War, and the Russo-Japanese War, &c., afforded but little guidance as to how these developments should be met. The consequence was that a great number of cases came up for decision by the Prize Court in the last war. The Crown was obliged to have frequent recourse to the Court, not merely to obtain the actual condemnation as Prize of ships and goods that had been seized, but also in order to test, directly or indirectly, its right to effect any seizure at all in novel cases (i.e. even an initial seizure in Prize) irrespective of whether final condemnation ensued or not.[1] The great number and range of the Prize decisions of the last war, went very far to establishing what amounts to a sort of code of the grounds on which the seizure of goods in Prize can properly be effected, and although this code may stand in need of considerable expansion in the light of factors revealed by the present war, its existence, coupled with certain considerations to be noticed directly, has much reduced the necessity of recourse to the Prize Court.[2] In addition, physical factors peculiar to the present war have greatly diminished the scope, or rendered unnecessary the enforcement, of contraband control by naval action.[3]

III

A further important factor, in reducing the number of cases heard and decided in Prize during the present war has been the shift in emphasis

[1] It will be appreciated that a simple "seizure" in Prize is justified if there appears to be an adequate prima facie case of enemy ownership, destination or (in certain circumstances) origin. Final condemnation only follows if the enemy ownership, destination or origin is in due course held by the Court to be established. Even if, however, the case against the ship or goods ultimately fails and they are ordered to be released, the Crown will not be liable in damages if the original grounds of suspicion on which the initial seizure was based were adequately strong. The difficulties which have arisen have turned largely on the meaning to be given under modern conditions to the notions of enemy ownership, destination, and origin.

[2] It is of course always necessary to have recourse to the Court where it is desired to obtain the final condemnation of any goods and it is then necessary to establish the required case to that end. But, as will be seen, it is not now always essential, from a purely "blockade" standpoint, that actual condemnation should be obtained at all.

[3] Speaking generally, if the enemy effects imports directly through his own ports, or ports in territories occupied by him, their destination is obvious and few if any legal questions arise. Germany, not having command of the sea, could not do this and always sought to obtain overseas supplies through neighbouring neutral countries. Such imports are always more or less "disguised" and their control raises many legal problems. In the last war Germany was throughout fringed by neutral states such as Holland and the Scandinavian countries. In this war Germany soon came to occupy most of Europe, and the limited number of the unoccupied neutrals left greatly reduced the naval and control problem. So also did operational factors, for in consequence of the type of air and submarine warfare waged by the enemy, the Allies were obliged to declare as operational zones large areas of the waters off Europe and in the Mediterranean, and in these zones many ships were sunk which would normally have been captured or diverted.

as between the condemnation of goods and their initial seizure. Formerly it was all important not merely to seize goods but to obtain their actual condemnation. Apart from such considerations as the award of Prize money to the individual captor,[1] there was no other way of ensuring that the goods would not ultimately find their way to the enemy, for, unless condemned, seized goods must eventually be released to the owner, and under the system prevailing during the wars of the last century, there was, on release, little or nothing to prevent the owner from re-shipping his goods to any destination he pleased, other than an obviously enemy one; thus they might easily find their way to the enemy unless a further interception could be effected. The decision rendered in 1921 by the Judicial Committee of the Privy Council in the case of *The Falk*,[2] however, established[3] the principle that an order for the release of goods seized in Prize only operates to place the owner of the goods in possession of them in this country and does not of itself entitle him to remove them out of the realm. Whether he can do this or not will depend on extraneous factors such as whether shipping space can be found for them, or whether the goods themselves and their destination are amongst those for which the licensing authorities will grant the necessary export and transhipment licence. In fact, the position which appears to result from this decision is that goods seized in Prize (as opposed to those merely detained pending investigation) are deemed to have actually entered the country and, on release from Prize, automatically fall under the general legislation governing the export or removal of goods from the country and can therefore only be exported or removed by complying with the requirements of this legislation.[4] This position appears to be clearly established in the following extracts from the judgment of the Privy Council[5] (the cargo involved consisted of tanning materials):

"At this time neither quebracho extract nor chestnut extract could be exported from the United Kingdom except by special licence, by virtue of a proclamation dated February 3, 1915, and of an Order in Council dated March 18, 1915, issued under the Customs and Inland Revenue Acts of 1879 (42 and 43 Vict. c. 21), the Customs (Exportation Prohibition) Act, of 1914 (4 and 5 Geo. V, c. 64), and other statutes. . . .

"No doubt the effect of sending the vessels in for further inquiry was to bring this cargo within the ambit of the prohibition of export of tanning materials, but it does not follow that all the claimants' loss thereby can be thrown on the captors. The same misfortune would have fallen on them if the vessels had come into a British port of refuge and had there discharged the goods. . . .

"A decree for release does not warrant actual ability to remove the goods from the realm. This might be impossible for want of bunker coals, or of labour, or of repairs, and yet it could not be said that the redress given by the Prize Court was

[1] A right to this could of course only arise on actual condemnation, for only then did the ship or cargo become, in the final sense, good and lawful Prize. During the last war the old Prize money system was replaced by one under which all the personnel of the navy became entitled to share in a sum set aside for the purpose out of the proceeds of condemned captures, irrespective of whether the individual recipient had actually been concerned in any capture or not.

[2] 3 British and Colonial Prize Cases, 955.

[3] Though, as it was not rendered until 1921, its practical consequences have only come to the fore in the present war.

[4] These are of course applicable generally to all persons in the country, and to goods whether originating here or imported.

[5] *Ubi supra*, pp. 957–8, 959, and 966–7.

made inefficacious by reason of something of which that Court ought to take notice. As is assumed in *The Dusseldorf*, release means release out of the custody of the Marshal in this country, where the goods are, and it is for the owner of them to arrange to remove or dispose of them as he can. The Court of Prize cannot give itself a more extensive jurisdiction in cases where the neutral is unable to remove his property out of the realm, or award damages against the Procurator-General for consequences arising from matters to which he is a stranger, merely because he and the officers of the Customs are alike in the service of the Crown. As a matter of fact, in this case the prohibition on export was duly made under statutory authority, and the question of granting a licence to export was not raised, but had it been otherwise the claimants should have sought their remedy, if any, against the officials actually concerned, in the ordinary Courts of the country. An imaginary case was put of sovereign power being used to thwart neutral claimants, to stultify the Prize Court, and to defeat the benefit of adjudication in prize, by an executive prohibition of the export of any and every subject matter released. Their Lordships cannot entertain so far-fetched a case. Should it ever arise, the Courts of the country concerned will be most fitted to pass upon it. The jurisdiction of the Court of Prize is to condemn or to release, not to override the executive after release has taken place. It is bound by the statutes of this country, in which it sits, and cannot interfere with acts done under Proclamations or Orders in Council validly issued by virtue of those statutes. If this is so, it cannot do indirectly what it has no power to do directly, and give damages against the Crown in prize because it has no power to give to the successful claimants permission to export."

The first of the foregoing passages is of interest as implying that the Court deemed seized goods to rank as imports for purposes of export licensing, but the point is only of incidental importance since even if the goods did not rank as imports the question of their leaving the country would be one of transhipment and they would be subject to the regulations governing that matter. The second passage indicates that goods are not immune from the export or transhipment regulations by reason of the fact that they were discharged and seized only in the exercise of contraband control and would not otherwise have left the ship or entered the country.[1] The third passage shows that the Prize Court is only concerned with the question of release or no release, and that a claimant to whom goods have been released could not make the refusal to him of a licence to send the goods out of the country, or to a given destination, the subject of a claim for damages in the Prize Court. Nor could it, as such, be the subject of a claim in the ordinary courts, which are bound by the licensing regulations.[2]

[1] It is of interest to compare this with the view taken by the Privy Council in *The Zamora* (see p. 81 below) that goods brought in purely for contraband control ought not to be regarded as liable to be requisitioned under the municipal regulations governing the requisitioning of property in the country—although if seized as Prize they could be requisitioned by order of the Prize Court acting under international law principles. There is, however, an obvious difference between goods still subject to contraband examination at a control base by an extension of the right of visit and search at sea, and which have never technically entered the country at all, and goods seized as Prize, placed in the custody of the Court and subsequently released.

[2] The possibility of such a claim, indicated in the third of the above citations from *The Falk*, would only arise if a licence were refused, or rather shipment prohibited for lack of a licence, in circumstances not warranted by the regulations themselves, in which case proceedings might lie in the ordinary Courts against the individual officer responsible. But this possibility is in no way peculiar to the case of released goods: it exists every time a licence is refused for the export of, e.g., goods produced or manufactured in this country, or for the transhipment of goods not seized as Prize and passing in transit through the country.

It does not, of course, follow from the inability of the owner of released goods to take action in the courts in the event of a refusal of leave to remove them or to license their departure to a given destination, that his Government or the Government of the country to which the goods were originally consigned cannot make the refusal the subject of a diplomatic complaint. The argument would doubtless be that a belligerent can stop goods consigned to a neutral country only on the ground of ultimate enemy destination, and that once the existence of any such destination has been negatived by the release of the goods there is no valid reason for not letting them proceed. The reply would be that absence of enemy destination certainly entitles the claimant to the release of his goods out of the custody of the Prize Court, but that it does not operate to free them from restrictions due to other causes; that all goods in the country are subject without distinction to the licensing regulations irrespective of where they originated or of how they came there; that although goods still undergoing their initial contraband examination would not be deemed to have entered the country, this cannot be the case with goods actually seized as Prize, the right to interim possession of (though not the property in) which is vested in the captors, i.e. the Crown, and the care and custody of which lies with the Admiralty Marshal, who could not discharge his functions if the goods were not deemed to be in the country; that a State at war has, subject perhaps to the provisions of particular treaties, an absolute right to prevent or control, without assigning reasons, the egress from or transhipment in its territories of all goods which are in or have entered them; and that, in consequence, release restores the goods to the owner, but does not entitle him to deal with them except in accordance with the local regulations. The case may be arguable either way, but in any event the matter would be between the two Governments as a diplomatic issue and could not be made the subject of proceedings in any Prize or municipal court.

It is important to notice that the principle established by the decision in the case of *The Falk* applies not only where the condemnation of the goods has actually been sought and not obtained, but also where it has not been sought at all, the court ordering release with the consent of the Crown[1] or on the application of the owner where the Crown, having seized the goods, has not proceeded with the matter. It is evident therefore that, purely from the standpoint of the authorities responsible for the conduct of the blockade, the principle in question has greatly diminished the importance of and need for obtaining actual condemnation.[2] Since the goods can in any event be prevented from reaching any suspect or undesirable destination, it is often a matter of relative indifference to the Crown, in its belligerent capacity,[3] whether actual condemnation is obtained or not. This would foster a tendency to confine the process of seeking condemnation to cases where the enemy destination, origin, or ownership of the goods was clear beyond any peradventure, and to release in all other cases.[4] Needless to say the decision

[1] Cf. footnote 2 on p. 78 below.

[2] The main *practical* effect of condemnation may often now be only a financial one, i.e. a matter of revenue, or of Prize money.

[3] If the Crown requires the actual goods they can in any event be requisitioned out of Prize in a proper case, irrespective of eventual condemnation (see below, p. 79). The revenue aspect remains, of course, for if requisitioned goods are eventually condemned the Crown will not have to pay for them.

[4] As to release, see footnotes on p. 78 below.

in the case of *The Falk* in no way relieves the Crown from a liability for *damages* in cases where the *initial* seizure of the goods was not justified (i.e. not based on adequate grounds of suspicion[1]): consequently it affords no encouragement for effecting light-hearted seizures in the belief that any inadequacy in the case for seizure can be cured by a subsequent release. Similarly the decision affords no immunity from any liability that might arise if goods were seized or simply retained indefinitely in Prize without the case being either prosecuted to condemnation or the goods being released voluntarily.[2]

IV

The power of the Prize Court to make an order for the sale of goods seized in Prize, or for their requisitioning on behalf of the Crown, is another factor which has greatly reduced the importance from a blockade standpoint of actual condemnation. Where such an order is made the goods are at once disposed of to a private buyer or to a government department, and their price or appraised value stands in the Prize Court in lieu of them. Any eventual order for release or condemnation operates not on the goods themselves but on the money representing them. If there is a release, what the owner gets is not his goods but a sum of money. If there is condemnation, this sum accrues to the Crown or to the Exchequer.[3] In any case the goods can never reach their original suspect[4] destination. As a result of new factors created by modern warfare and of certain decisions of the Prize Court in the last war, a very considerable extension has been given to the process of ordering the sale or requisition of seized goods. In view of the practical importance of the matter and of certain obscurities formerly connected with it, some account of the law on the subject will be desirable. It should, however, be noticed that the decisions of the last war, on which the law is very largely based, do proceed on the assumption (then quite valid) that if the owner received the fair market value of his goods it was a matter of relative indifference to him if what was released to him was money and not the goods themselves. Consequently his position was in no way prejudiced by an interim sale or requisition of the goods. For reasons to be indicated, it is far from certain that this assumption is, under present-day conditions, still warranted. Nevertheless it seems unlikely that there will be any major change in the law and practice of sale and requisitioning, since the process is one which really arises from the necessities of the case.

So far as the sale of seized goods is concerned, there is no inherent *general* power in the Prize Court[5] to order this, but on the other hand there is power

[1] See below, p. 80, 81, 94.

[2] Despite the duty in principle of the captor to proceed with the case or consent to a release, there are under modern conditions various circumstances in which inaction would, over a considerable period at any rate, be justified; but the matter cannot be discussed here.

[3] According to whether it ranks as Droits of the Crown or Droits of Admiralty.

[4] It must, of course, have been suspect and for sufficient cause, or the initial seizure would not have been justified.

[5] It will be appreciated that once goods have been seized and placed in Prize no further dealings with them can take place except by order of the Prize Court, although its orders may in certain respects be purely formal. Thus it is often convenient to speak of the Crown (or rather the proper officer of the Crown; in the United Kingdom the Procurator-General) releasing goods, when what actually occurs is that the Crown consents to an order for release. The order issues out of the Registry of the Prize Court (Prize Court Rules, 1939, Order XIII,

to do so in given cases, and claimants have no absolute right to receive their goods back *in specie* if released (see *per* Sir Samuel Evans in *The Zamora*, 1 B. and C.P.C. 309, at p. 321). Although the "Primary duty of the Prize Court . . . is to preserve the *res* for delivery to the persons who ultimately establish their title" (the Privy Council in *The Zamora*, 2 B. and C.P.C. 1, at p. 19), yet sale can properly be effected in certain cases, namely, "either because the *res* is perishable in its nature or because there is some other circumstance which renders its preservation impossible or difficult" (*ibid.*).

There are obviously various circumstances besides perishability which will justify an early sale. The difficulties and expense of warehousing are a case in point, especially where there is congestion or lack of accommodation. The expenses of warehousing if prolonged, as is often the case where proceedings are pending or negotiations going on, may eat heavily into the value of the goods and make a cargo not physically perishable one of dwindling or perishable value. In this connexion it is important to notice that unless an order for release otherwise directs, the Admiralty Marshal is only bound to release goods "upon payment to him of all fees due to and charges incurred by him or on his behalf in respect of the property" (Prize Court Rules, 1939, Order XIII, rule 7). It would, in fact, be unusual for a release order to provide otherwise (see *The Leonor*, 29 July 1922, unreported, and *The Dusseldorf*, 3 B. and C.P.C. 664, at p. 672). In such cases sale is as much in the owner's interest as if the goods were physically perishable. In areas exposed to the risks of bombing, moreover, it may be that certain types of goods ought not to be stored at all, or not in certain buildings, and if alternative accommodation cannot be found they must be disposed of.

Turning now to requisitioning, although the right to requisition seized goods was extensively practised by American courts in the Civil War, the only known[1] case of it in any British Prize Court, previous to the last war, was that of *The Curlew* in 1812 (Stewart's Vice-Admiralty Reports, Nova Scotia, p. 312) in which it was held that "although as a rule the Court has no power of selling or bartering vessels or goods in its custody, prior to adjudication, to any Departments of His Majesty's Service, nevertheless there may be cases of necessity in which the right of self-defence supersedes and dispenses with the usual modes of procedure".[2]

In the last war the matter was finally and authoritatively settled by the

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[*Note continued from previous page.*]

rule 4 (a)) and is necessarily formal in that if the Crown is ready to see the goods released no one else has any motive for opposing. Similarly, when it is stated that the Admiralty Marshal sells goods or that the Crown requisitions them, what has happened is that an application for a sale or requisitioning has been made to, and granted by, the Court. The application is normally made to the Registrar and, if unopposed, would as a rule be granted, unless this would be clearly at variance with the recognized rules governing the subject. But there is an appeal from the Registrar to the Judge of the Prize Court, and any contentious proceedings would be likely to come before the latter.

[1] See Colombos, *Law of Prize*, p. 277, and the Privy Council in *The Zamora* (2 B. and C.P.C. 1, at p. 22).

[2] Although in this case the matter was put upon the possibly rather limited ground of immediate self-defence, it is interesting to note that the actual goods requisitioned appear for the most part to have been taken for general war purposes. Apart from the case of some small arms "very much and immediately needed for the defence of the province" there was some timber for use in the naval yard at Halifax, and the ship itself was taken for use as a prison ship.

judgment of the Privy Council in *The Zamora* (2 B. and C.P.C. 1), where it was laid down (at p. 26) that

"A belligerent power has by international law the right of requisitioning vessels or goods in the custody of its Prize Court pending a decision on the question whether they should be condemned or released, but such right is subject to certain limitations."

The limitations were then stated as follows:

First "the vessel or goods in question must be urgently required for use in connexion with the defence of the realm, the prosecution of the war, or other motives involving national security";

Secondly "there must be a real question to be tried, so that it would be improper to order an immediate release";

Thirdly "the right must be enforced by application to the Prize Court,[1] which must determine judicially whether, under the particular circumstances of the case, the right is exercisable".

The first of these conditions gives rise to no difficulty since the Privy Council itself went on to state that

"the Judge ought, as a rule, to treat the statement on oath[2] of the proper officer of the Crown . . . as conclusive. . . . This is so in the case of property being requistioned under . . . municipal law . . . and there is every reason why it should be so also in the case of property requisitioned under . . . international law. Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a Court of Law, or otherwise discussed in public".

It follows that the only substantial ground on which an application for a requisitioning order could be contested would be failure to comply with the second of the foregoing conditions. As to this the Privy Council, elaborating its view, said (*ibid.*, at p. 27) that

"the judge should, before allowing a vessel or goods to be requisitioned, satisfy himself—having regard, of course, to modern conditions—that there is a real case for investigation and trial, and that the circumstances are not such as would justify the immediate release of the vessel or goods."

(In an earlier case, *The Antares* (1 B. and C.P.C. 261, at p. 268), Sir Samuel Evans had put it much more widely and thought it sufficed if "there was . . . reason . . . to believe that the cargo might not be entitled to be released".) In actual practice, since seizure is directed only in cases where there are appreciable circumstances of suspicion calling for investigation and explanation, this matter should not, and normally does not, give rise to any difficulty. Generally speaking it may be said that unless the seizure has taken place in spite of such an absence of any reasonable grounds for it as would give rise to a claim for damages, there will be no reason why a requisitioning order should not be made. In this connexion it will be appreciated that English Prize Courts have repeatedly expressed the view that the existence of any reasonable circumstances of suspicion, or of facts calling for explanation, will suffice to throw the onus of proving innocence on to

[1] Normally to the Registrar—see footnote 5 on p. 78.

[2] Usually in the form of a written affidavit by an officer of the Department requiring the goods.

the claimant and to avoid any liability in the Crown for damages (see, for instance, *The Ostsee* (Spink, at p. 178); *The Louisiana* (3 B. and C.P.C. at p. 61); *The Falk* (*ibid.* at pp. 959, 962, and 964); *The Baron Stjernblad* (*ibid.*, pp. 18–19); *The Antares* (1 B. and C.P.C. at p. 271.)

The significance of the third of the foregoing conditions, namely, that there must be an application to the Prize Court, before a ship or cargo is requisitioned, will be apparent from the following explanation given by the Privy Council in *The Zamora* (*ubi supra* at p. 28) in which this condition was stated to be

"based on the principle that the jurisdiction of the Prize Court commences as soon as there is a seizure in prize. . . . From the moment of seizure the rights of all parties are governed by international law. It was suggested . . . that a vessel brought into harbour for search might, before seizure, be requisitioned under the municipal law. This point, if it ever arises, would fall to be decided by a Court administering municipal law, but from the point of view of international law it would be a misfortune if the practice of bringing a vessel into harbour for the purpose of search—a practice which is justifiable, because search at sea is impossible under the conditions of modern warfare—were held to give rise to rights which could not arise if the search took place at sea".[1]

It is clear from this passage that the reason for the rule obliging application to be made to the Court is to prevent the seizure of goods against which no real suspicion of enemy destination exists, merely because the Crown would like the use of them, the proceeds being subsequently released to the owner. It is equally clear on the other hand that if an adequate case for seizure does exist there is no reason why the goods should not be requisitioned if wanted in the national interest.

The theory underlying the sale or requisitioning of seized goods is (*a*) that it would be unreasonable that goods the preservation of which was difficult or impossible, or which were urgently required for national use, should have to be kept *in specie* to await the outcome of the proceedings, and (*b*) that the rights of the claimant are not prejudiced since, if an order for release is made in his favour, he will obtain, if not the goods themselves, their value. In *The Zamora* (2 B. and C.P.C. 1) the Privy Council stated (at p. 19) in regard to cases where special circumstances affected the preservation of a shipment that "it is in the interests of all parties that it should be sold or realized" and as regards the requisitioning of goods (*ibid.*, p. 23) that "there are special reasons which render it reasonable that a belligerent should in a proper case have power to requisition them". In *The Pellworm* (3 B. and C.P.C. 1053) the Privy Council pointed out (p. 1067) that a claimant "pending adjudication . . . has no benefit from the use of the ship, and she remains at his risk in the Marshal's custody. Accordingly . . . a practice [requisitioning] has been established which is beneficial alike to the captors, to the Court, and to the claimant". They went on to say that "If ultimately a decree [of release] is made in his favour, the claimant could desire nothing better than the appraised value . . ." This last point was also dealt with by Sir Samuel Evans in *The Zamora* (1 B. and C.P.C. 309 at p. 320): "Any

[1] It is implicit in this passage that the Prize Court would regard it as contrary to international law for the Crown to requisition goods brought or coming in purely for contraband control and still in process of examination and inquiry. Any other view would clearly be entirely destructive of neutral rights.

order made upon the interlocutory application will not prejudice the case for the claimants upon the final hearing. It may be that their cargo will then be decided to be confiscable. . . . Or it may happen . . . that the decision will be the other way; in which case the claimants will have the value of the cargo decreed to be paid to them, and possibly, in addition, they may be awarded sums for damages and costs". In the same case Sir Samuel Evans rejected the view that claimants have any absolute right in all circumstances that their goods should "be preserved to be delivered up in the same character if release is ordered; and that they cannot, except with the consent of the claimants, be sold or converted into a fund . . ." This view was (so far as this point goes) upheld on appeal to the Privy Council.

There is an assumption implicit in the foregoing citations that a claimant, while *prima facie* entitled to the return of his goods if released, is yet to be regarded as having received full satisfaction if he gets their value, so that a sale or requisitioning effected on proper grounds is not to be regarded as prejudicial to his rights. This is of particular interest from the standpoint of contraband control where the real aim is not to mulct the owner but to prevent the goods reaching any dangerous destination.[1]

The sale and requisitioning of seized goods is not of course a mere matter of procedure peculiar to British courts. It is a right recognized by international law. In *The Pellworm* (*ubi supra* at p. 1067) it was stated to be "no mere matter of municipal law which does not bind a foreign Government . . . it is part of the practice of a Court which administers the law of nations . . ." A leading foreign authority on Prize Law, Verzijl, states indeed (*Le Droit des Prises de la Grande Guerre*, p. 1275), that it is only in the English courts that the legality of requisitioning has ever been questioned, the courts of other countries accepting it as a matter of course, and he cites decisions of the French, Italian and German Prize Courts to that effect. As to French practice he says, "les administrations de la guerre et de la marine ont souvent réquisitionné ou vendu des chargements saisis à bord de navires neutres ou alliés, même de nature non périssable". Colombos (*Law of Prize*, p. 279) equally draws a contrast between the limitations placed by English practice on the right to requisition which provide "a serious guarantee to neutrals", the determination of the question not depending "on the executive orders of the belligerent's Government", and the practice of other countries where the "legality of the step was not questioned by their respective Prize Courts, and no special conditions were raised on its application, other than the payment of indemnity to the neutral owners". As regards American practice, a long list of decisions of the United States Prize Courts was cited in *The Zamora* indicative of an inherent power to order sale for any reason that seemed good to the court, and of an absolute right in the belligerent Government to requisition. It will thus be seen that English practice on these points is more favourable to neutrals than that of most countries.

[1] In actual fact, as opposed to law, goods may in particular circumstances have an intrinsic value not appraisable in terms of money. The reason for the attitude of the Prize Courts is that they have tended to regard transactions largely as matters of buying and selling, goods and money being interchangeable, and also because they necessarily treat Prize causes as matters between the Crown and an individual claimant, to the exclusion of the desire of some Government that the actual goods should be imported into its territory. In the case of a requisitioned vessel the point often does not arise since, if there is an eventual order for her release, and she still exists, she will in due course be returned to her owner.

V

The second main technique of contraband control is the so-called "navicert" system. Its mechanics can be studied elsewhere, but, as is presumably generally known, a navicert is a document issued by the competent belligerent authority in respect of a given consignment stating that, so far as is known at the time of issue, there is no objection to the consignment. A "ship navicert" is a certificate issued to and carried by the master of the vessel when her entire cargo consists of navicerted goods. Neither document is a guarantee against interception or seizure. Fresh facts may have come to light since the document was issued (particularly when, as not infrequently happens, there is a considerable interval between issue and actual shipment). Or the situation may have changed, e.g., the destination of the ship or goods may have become an enemy or enemy occupied one since the journey started. Subject to such considerations as these, however, and to the right which all belligerents must reserve to effect occasional interceptions and diversions as a deterrent against the clandestine carriage of unnavicerted or "smuggled" goods, the possession of a navicert will normally protect the vessel from interception, and the goods from interference or delay.

In essence, therefore, and subject to certain considerations which will be noticed presently, a navicert is a facility, voluntarily provided by the belligerent, of which neutral traders can (but are in no way bound) to avail themselves. If they do, they will normally save themselves, their goods and their ships much trouble, expense, and delay. The absence of a navicert will not however in any way entail of itself the forfeiture of ship or goods.

Although this seems a simple position, there has been a good deal of misconception as to the nature and legal aspects of the system, and to these some consideration must now be given. It is sometimes asked on what legal foundations the system rests. To this the answer must be that the system as described above rests, so far as legal foundation goes, on the ordinary and acknowledged right of a belligerent to intercept any vessel at sea, to divert her into port for examination, to seize any items of cargo suspected on reasonable grounds of being enemy-owned or of having an enemy destination, and in certain circumstances to seize the ship also. In instituting a navicert system a belligerent in effect announces that, subject to a general reservation of his rights, he will not in practice exercise them if certain specified requirements are fulfilled by ship and cargo, and if certificates to that effect are issued by his competent authorities. Traders can then please themselves; but so far as the belligerent is concerned he clearly requires no special legal warrant either for issuing his navicert, or for refusing it if the necessary conditions are not, in his opinion, fulfilled; or for exercising his ordinary belligerent rights in cases where a navicert has not been applied for, or has been refused. Equally, under the system as originally instituted,[1] the absence of a navicert is not in itself a ground for seizure, still less for condemnation. If unnavicerted goods are seized it is because of the circumstances of suspicion attaching to them which caused a navicert to be refused for them, or would have caused this had one been applied for.

[1] I.e. in the last war and during the early part of the present one.

Such was the legal position up to, at any rate, the issue of the Reprisals Order in Council of 31 July 1940. It must now be considered how far, if at all, the provisions of that Order modified the position. Before doing this, however, it will be well to notice certain practical results of the navicert system. The inconveniences, delays and expenses entailed by the diversion of vessels in the exercise of contraband control and the subsequent examination and consideration of their cargoes, are apt to be so serious that as soon as a navicert system is instituted there is a widespread tendency on the part of shippers to make use of it.[1] This in turn soon causes shipowners to refuse to carry unnavicerted goods, because the presence of even a single such consignment on board will disentitle the ship to a ship navicert and render her liable to diversion. This attitude on the part of shipowners is reinforced by that of the shippers themselves who, for similar reasons, do not care to ship their goods on a vessel that does not qualify for a ship navicert. These factors act and re-act on one another until, presently, a situation is reached in which it is virtually impossible to ship unnavicerted goods.[2] There is still, of course, no *legal* bar to such shipments, but there is a very definite practical bar; and although it is not imposed by the belligerent and arises out of the surrounding circumstances, it is a consequence, even if an indirect one, of the fact that a navicert has not been issued.

Under such conditions, it is easy to understand a tendency in neutral quarters to question the legality of the navicert system and to raise various queries, as for instance on what legal grounds can a belligerent assume to "compel" a shipper to obtain a navicert as a condition of being able to ship his goods, or how can he justify refusing a navicert for consignments of an apparently innocent character. As regards the first question, and subject to any considerations arising out of the Order in Council of 31 July 1940, the answer, as has been seen, is that the belligerent does not in fact compel the shipper to obtain a navicert or prevent him from shipping his goods without one (if he can).

As regards the second question, it is clear that *in its origin* a navicert is simply a facility which the belligerent is not in any way obliged to afford and the grant or refusal of which in any given case he cannot be legally obliged to justify. Since the absence of a navicert is not in itself a ground for seizure or condemnation, and only entails the exercise of a contraband control which the belligerent in any case has an absolute legal right to exercise, the grant or refusal of any certificate on the basis of which the belligerent is prepared to forgo or modify his strict rights, must legally be within his absolute discretion.

Naturally, the navicert system is capable of grave abuse at the hands of an unscrupulous belligerent, as for instance if navicerts were refused arbitrarily or capriciously or allocated with a view to the belligerent's own commercial advantage, or as a means of bringing political pressure to bear. It would seem however that such abuses would be of a political and not a legal

[1] Indeed, there may well be a demand from shippers for the institution of a system of this kind, even where the belligerent does not initiate it.

[2] In practice (save in exceptional cases such as those instanced in footnote 1 on p. 88) such a thing can only occur if the shipment is clandestine or effected with the connivance of the Master, or if it is on a definite blockade runner intending to attempt a direct passage to an enemy-controlled port.

character, that they could be made the subject of diplomatic complaint on general and political grounds by the neutral government concerned, but that it would be difficult to allege a breach of any rule of international law. The refusal of a navicert could in any case certainly not, as such, be made the subject of any claim or proceeding in the Prize Court, which is not concerned with the grant or refusal of these documents but solely with the physical dealings by way of seizure or detention which a belligerent may have with the actual ship or goods. The propriety or otherwise of refusing a navicert can only arise in the Prize Court, and then only in incidental fashion, in the event of a belligerent proceeding to seize goods which have been shipped despite the refusal. The belligerent is however entitled, in answer to any complaint against the refusal based on any supposed *legal* ground, to point out that seizure or even detention is by no means a necessary consequence of shipment without a navicert; that if either does in fact take place and the circumstances do not justify it, the neutral has his remedy in the Prize Court; and that it is not until the belligerent takes some overt action of this kind against ship or goods that any legal question can arise: up to that point the belligerent has merely been asked to issue what amounts to a pass through his legitimate contraband controls and, as a matter of law, he can neither be bound to issue it nor to justify its non-issue.

Even if the above view should call for modification in the light of the particular provisions of the Order in Council of 31 July 1940, it has seemed desirable to stress the basic position, since there has been much misconception about it. Moreover it must be frankly recognized that belligerents often do (and with perfect justification) refuse to issue a pass for goods, on grounds which might well not justify an actual seizure if the goods came forward without a pass. If a belligerent has a definite objection to a given shipment, not based on arbitrary or capricious grounds but connected in some form with the conduct of the war, it would obviously place him in an entirely false position if he were bound to issue a pass for it merely because there was doubt whether any eventual seizure in Prize could be justified. The belligerent is entitled to say that he will not *facilitate* any shipment he objects to, that the shipper can then decide whether to try and ship it notwithstanding, and that should be succeed in doing so the belligerent must then decide whether he can seize the goods or not, the shipper having his legal remedy if an unjustified seizure in fact occurs.

VI

The position must now be considered in the light of the Reprisals Order in Council of 31 July 1940. The situation out of which this Order arose was the following. The navicert system had originally been introduced in November 1939, and gradually extended until, by the summer of 1940, its use was general for all shipments to European destinations. The process of intercepting vessels and diverting them into port for contraband control had nevertheless, though in diminishing degree, continued. Owing to the supervening German occupation of all that part of the western European coastline stretching from Northern Norway to Bayonne, this process had now become highly perilous to all shipping, and in the interests of traders

it was desirable to discontinue it so far as possible and to rely on some form of control "at the source" (i.e. exercised previous to or on shipment). The navicert system, now in general use, afforded the obvious means of doing this, but, in the circumstances, it seemed desirable to place it on a more definite foundation. Although the strict legal position still was that the absence of a navicert was not, as such, a ground for seizure, two factors had created a situation in which unnavicerted goods were necessarily extremely suspect. The first of these was the almost universal use of the system by all bona fide shippers. The second was the enemy occupation or control, as from the summer of 1940, of so great a part of the European continent as to create an overwhelming presumption that some considerable percentage of the goods consigned to European neutral destinations (the only channels of entry) must be intended for the enemy or, if not so intended originally, would nevertheless find their way into enemy hands. That any unnavicerted goods were highly likely to form part of this percentage was obvious.

Even so, it may be doubtful whether these factors, taken by themselves, would have afforded legal justification for pursuing a policy of making the absence of a navicert a formal ground *per se* for a seizure in Prize; though the authorities might well have decided to adopt such a policy and pursue it unless and until challenged in, and declared to be unwarranted by, the Prize Court. It so happened however that fresh and recent illegalities on the part of the enemy occurred, not only adding to but differing in kind from those which had led to the issue of the original Reprisals Order of November 1939. These were held clearly to justify further Reprisals against the enemy's commerce; and the resulting Order of 31 July 1940, therefore, (*inter alia*) formally declared a liability to seizure on the mere ground that the goods, being of the class specified in the Order, were not covered by a valid navicert. After reciting the enemy illegalities on which the Order was based the Preamble concluded with the following recital:

"AND WHEREAS, for the convenience of traders and for the avoidance of the risks and delays inseparable from the diversion of ships into port in the exercise of belligerent rights against commerce at sea, a system has been instituted whereby passes can be obtained for approved cargoes and for ships which carry none but approved cargoes:"

Next there came definitions of (*inter alia*) the term "navicert":

"the term 'Cargo Navicert' means a pass issuable by the appropriate British or Allied authority in the neutral country of shipment in respect of goods consigned to any port or place from which they might reach the enemy, to the effect that, so far as is known at the date of issue, there is no objection to the consignment;

"the term 'Ship Navicert' means a pass issuable to a vessel in respect of a given voyage by the appropriate British or Allied authority at all principal British, Allied or neutral ports, if that authority is satisfied that the vessel is duly qualified to receive it".

Finally the relevant operative provisions on this subject read as follows:

"2. Any vessel on her way to or from a port through which goods might reach or come from enemy territory or the enemy armed forces, not being provided with a Ship Navicert valid for the voyage on which she is engaged, shall, until the contrary is established, be deemed to be carrying contraband or goods of enemy

origin or ownership, and shall be liable to seizure as Prize; provided that a vessel, other than a vessel which sailed from or has called at an enemy port, shall not be liable to seizure under the provisions of this Article unless she sailed from or could have called at a port at which she would, if duly qualified, have obtained a Ship Navicert.

"3. (1) Goods consigned to any port or place from which they might reach enemy territory or the enemy armed forces, and not covered by a valid Cargo Navicert or, in the case of goods shipped from a British or Allied port, by a valid Export or Transhipment Licence, where such Licence is required, shall, until the contrary is established, be deemed to have an enemy destination."

This Order has sometimes, loosely, been called the "compulsory" navicert Order, with a view to distinguishing the régime set up by it from the previous "voluntary" system. The use of these terms has an element of convenience if their purport is confined to the distinction between a system under which the absence of a navicert is *per se* a ground for seizure and one under which it is not.[1] Unless carefully so confined, however, the term "compulsory" navicert is apt to be misleading. This Order did not (and clearly could not), any more than was previously the case, *compel* shippers to take out navicerts as a pre-condition of effecting shipment. There was still no *legal* bar to shipment without a navicert. The Order did not even purport to make the absence of a navicert an automatic or inevitable ground of seizure, still less of condemnation. Indeed, beyond materially increasing the likelihood of seizure and the prospects of condemnation, the Order made little difference in these respects.[2] The real changes effected by it were, it would seem, that for the first time a legal *liability* to seizure was created, arising from the mere fact of the absence of a navicert, coupled with a legal presumption (unless and until rebutted) that unnavicerted goods had an enemy destination. The effect of this was twofold. In the first place it would seem that the absence of a navicert must necessarily be a complete answer to a claim for damages based on the allegation that there never was any reasonable or probable cause for the seizure; for the legal presumption of enemy destination or ownership arising from the absence of a navicert would itself constitute reasonable and probable cause for the seizure. Secondly, the presumption prevailed until rebutted. Consequently, unless the owner came forward and established the innocence of the goods, the Crown could, it would seem, in theory at any rate,[3] obtain their condemnation on the simple ground that there was no navicert and without alleging any more material fact than that, or disclosing the grounds on which a navicert was or would have been refused. Neither of these consequences has, so far as is known, been tested in the Prize Court, partly because of the small number of unnavicerted goods that are shipped (other than those of a deliberately blockade running

[1] I.e. under which the absence of a navicert is merely a factor of greater or lesser suspicion calling for further inquiry and possibly leading to seizure, according to the circumstances, but not in itself constituting the formal ground of the seizure.

[2] Less even than might be supposed, for by that time it could be taken as a virtual certainty that unnavicerted goods were not innocent unless a manifestly convincing explanation of the absence of a navicert was forthcoming.

[3] In practice, it is most improbable that no other ground would exist and perhaps unlikely that, if it did not, the Crown would regard it as necessary to seek condemnation. The alternative in this case would be to consent to a release of the goods to the owner on his giving an undertaking in suitable terms as to their future disposal.

character whose enemy character is in any case obvious), and partly because the Crown has doubtless refrained from exercising its technical rights under the Order where it has appeared that the goods were in fact innocent and there was a reasonable explanation for the absence of a navicert.[1]

Despite the fact that, for the reasons already given, the Order did not make navicerts "compulsory" the results just noticed do raise the following serious point. It may be argued that the definition of a navicert given in the Order, coupled with the presumption of enemy destination or ownership which it attaches to unnavicerted goods, implies and carries with it an obligation that the competent authorities will normally grant a navicert in all cases where there is no adequate reason for suspecting an enemy interest; and similarly that it would be improper for the authorities to refuse a navicert except in cases where the goods would, if they came forward, be liable to seizure on the merits of the case, so to speak. The Crown cannot have it both ways, it might be said; if it takes power to seize, and even in certain events to obtain the condemnation of goods, on the simple ground of the absence of a navicert, then, since the Crown is also itself the navicerting authority, this must carry with it an obligation not to refuse a navicert except on adequate grounds of suspicion of an enemy character or interest of some kind in the goods.

It is submitted however that, whatever cogency this view may possess, it lies in the political and diplomatic, rather than in the strictly legal sphere. If there is any such implication or obligation as has been suggested, it is of a political or moral, not of a legal, character. For reasons which will be indicated, the Order certainly does not involve any obligation to refuse navicerts only on evidence which would have warranted a seizure.

In the first place it is clear that the object of the Order must have been, as an act of legitimate reprisals, to enlarge the normal legal powers of the Crown in the matter of effecting seizures and obtaining condemnations, for otherwise there would have been no point in it. Now it is obvious that this object must be defeated if one of the effects of the Order is that the Crown is obliged to confine refusals of navicerts to cases where the circumstances are such as would in any event make the goods legally liable to seizure if shipped and intercepted, for if the goods are of that kind they could lawfully be seized anyhow, as a normal exercise of ordinary belligerent rights, and no special or additional powers by way of reprisals would be necessary to produce this result. So interpreted, the Order would simplify procedure but would add little or nothing to the Crown's existing rights and powers. Such an interpretation would take away with the one hand what had been given with the other and would render the Order, as a means of bringing increased pressure to bear on the enemy, which was one of its declared objects, largely nugatory. It would apparently have the result that a seizure effected on the ground of the absence of a navicert could be challenged in the Prize Court by challenging the refusal of the navicert and establishing that this was unjustified. It seems however abundantly clear on the face of the Order that its intention was to create an absolute liability to *seizure* (though not

[1] For instance, it might be necessary to ship goods immediately in order to catch a particular vessel, the application for a navicert being made after shipment and being possibly still pending at the time of the vessel's examination for contraband.

necessarily to eventual condemnation) on the mere ground that there was no navicert, and to render the seizure as such, effected on these grounds, immune from challenge or from any claim for damages. If this view is correct, it follows that the Prize Court must necessarily (unless the Crown volunteers information or possibly on an application for condemnation) refuse to go into, or even consider, the reasons why a navicert was refused. From this it follows that, except by challenging the whole basis of the Order as a legitimate act of reprisals, neither a seizure based on the absence of a navicert nor the refusal of the navicert itself, could be made the subject of any diplomatic claim based on legal grounds nor the subject of any claim in the Prize Court.

In fine, the object of the Order was, precisely, as a legitimate act of reprisals, to simplify the conduct of the blockade and to put increased pressure on the enemy by broadening the basis on which seizures could be effected—in fact to create a right to seize in cases where it would not necessarily have existed under the basic rules of Prize law. The exercise of this right would not necessarily entail the final loss of the goods to the owner, for it remains open to him to establish their innocence, in which case they or their proceeds would be released to him; but he would not be able to claim damages in respect of the seizure even if he could shew that there never had been any adequate case against the goods in point of substance. No doubt the same general implication underlay the régime set up by the Order as had always underlain the navicert system, i.e. that there would not be any deliberate abuse of belligerent rights and that navicerts would not be arbitrarily refused. No doubt any serious abuse could be made the subject of stringent diplomatic representations by the neutral government concerned, and even of political or economic counter-measures: but not, it would seem, of any legal claim.

The conclusion seems to be that, although on general grounds it may be less easy in consequence of the Order in Council to regard a navicert as a mere facility which it is within the absolute discretion of the belligerents to grant or withhold, yet from a formal and legal point of view the Order does not, in this respect, effect any substantial alteration in the pre-existing situation.

VII

The third main technique of contraband control is the so-called "rationing" of neutral countries. The idea underlying this process, expressed in a non-legal manner, is that it is only by limiting neutrals who have land communications with enemy territory to their own strict necessities in the matter of overseas imports that it is possible to ensure that no substantial proportion of these will reach the enemy. Failing that, however innocent many shipments may appear, or indeed be, in themselves at the time, it is certain that some considerable part of them, or of goods processed or manufactured from them, will find its way to the enemy. Put in legal terms, the foundation of a rationing system is that, where a neutral country is found to be importing greater quantities of any commodity on the contraband list than can be accounted for by its reasonable domestic needs, having regard to all the circumstances, including manufacture for export to innocent destinations,

a presumption arises that the surplus is going to the enemy. This will justify seizure, it being open to the owner to obtain the release of his goods (or their proceeds if there has been a sale or requisitioning in Prize) upon rebutting the presumption and establishing their innocence.

Further consideration must be given to the legal position, but first a word as to the mechanics of rationing. The system may either be agreed with the neutral country or imposed on it by the belligerent. In almost every case it is done by agreement, and there is usually little difficulty about this because the shortages of almost every kind of vital commodity which speedily make their appearance in any major modern war create a paramount necessity for neutrals dependent on overseas imports to make such agreements with the belligerent having command of the sea as will ensure the safe and regular arrival of their essential imports.[1] The agreement will fix the total annual amount of each rationed commodity to be imported, its distribution over the year (i.e. the monthly or quarterly "quotas") and the procedure for licensing the agreed shipments (e.g. by a combination of import licensing on the part of the neutral and the issue by the belligerent of navicerts for shipments within the quota, so long as such shipments are also unobjectionable in other respects[2]).

If a ration has to be "imposed", the belligerent will himself have to decide on the amounts up to which the neutral is to be allowed to import, seizing or detaining shipments in excess of these amounts. The fixing of these figures will be both an important and a difficult matter. It will be important because, unless the figures are reasonable having regard to all the circumstances and taking account of the neutral's position, it is clear that the necessary presumption (justifying seizure) that excess shipments are intended for the enemy, will not exist. It is difficult because, in war time, all sorts of factors may operate to justify a neutral in importing *more* than its normal peace-time requirements of a given commodity.[3] For instance, general war difficulties will probably justify the creation and holding of stocks over and above actual consumption. Again, a neutral will often be perfectly justified from its own standpoint in effecting greatly increased imports of vital war materials, and it may be quite clear that such imports are genuinely intended for the neutral. Yet they may be very objectionable from the standpoint of the belligerent. In one class of case the belligerent may have the strongest ground for thinking that the neutral intends in due course to enter the war on the enemy's side and is piling up armaments with that end in view.[4] Yet

[1] During both this and the last war the surface command of the sea on the part of the Allies, as regards all traffic going to Europe, has been so nearly absolute that they could have brought about a virtually complete stoppage of such traffic.

[2] The mere fact that the proposed shipment is within the current quota will not of course procure it a navicert if the consignor or consignee is listed as an enemy or has known enemy connexions; and there are of course other possible grounds of objection.

[3] It is perhaps worth noticing the converse, i.e. that a neutral country's imports may be statistically suspect even though not in excess of normal peace-time quantities. For instance, it is not inconceivable that the war might actually have reduced the neutral country's need for certain commodities, or at any rate for *overseas* imports of those commodities. Another possible case is that a neutral sympathetic to the enemy might have rationed or curtailed its own use of some essential war material, but continued to import as much as before, with a view to re-exporting the surplus to the enemy.

[4] An example is afforded by the policy and actions of Mussolini and the then Italian Fascist Government in the period September 1939 to June 1940.

the destination of the armaments is, at the time, unquestionably neutral. Or the belligerent may have every justification for the view that the neutral is likely sooner or later to be attacked by the enemy and to be unable to make effective resistance, whereupon its accumulated stocks of war materials will fall into enemy hands. Yet again the imports have, according to existing concepts of Prize law, a neutral, not an enemy, destination. These are matters which raise most difficult questions of contraband control, involving the question whether some revision of the concept of what constitutes enemy destination is not called for under modern conditions. However, the matter is one which in reality goes much beyond the topic of "rationing" alone, and various considerations, including those of space, prevent its further discussion here.

Assuming that, in imposing a rationing system, the belligerent has in fact fixed a ration excess over which will, in all the circumstances, raise a presumption of enemy destination, the next question is, what is the exact legal position if and when some consignment is seized in Prize as exceeding the ration?[1] This question has never been fully answered, but decisions of the last war afford considerable guidance. It appears to be settled, for instance (see further below), that an adequate "statistical" case[2] will *per se* (i.e. even in the absence of any suspicion attaching to the consignment on grounds specially connected with it as such) justify seizure and place upon the owner the burden of proving innocence, so that no damages can be recovered against the Crown in respect of the seizure. On the other hand, no case has yet occurred where goods have been *condemned* on statistical evidence alone. Despite this, there is ground for thinking (this view is the writer's: the matter is decidedly controversial) that the possibility of such condemnation, in an appropriate case, is by no means ruled out, and that the decisions even contain warrant for the view that it would be ordered in certain circumstances on a statistical basis only.

The purely legal difficulty inherent in the condemnation of goods on statistical grounds alone can be very shortly stated. It may be quite true that if a neutral country having land or short sea communications with enemy territory is found to be importing goods from overseas in clear excess of its normal domestic requirements even allowing for the maintenance and building up of legitimate stocks, a strong presumption may arise that all or part of the excess consists of imports which the enemy is seeking to effect, directly or indirectly, through the neutral territory. But it does not follow from this alone that the particular consignment which is the subject of the seizure is itself one of those destined for the enemy. For instance, it is quite possible (and in some cases even likely) that it was previous consignments within the figure of the neutral's normal imports that in fact went on to the enemy, the subsequent "excess" consignments being intended to remain

[1] It does not, of course, follow that every consignment that comes forward in excess of the ration will be seized in Prize. For one thing, it is not impossible in certain cases for such a consignment to come forward duly navicerted. Where relatively slight excesses, not over the annual ration as a whole but only over the current quota, are concerned, the usual practice would be, by arrangement with the parties, to detain the consignment until the start of the next quota period.

[2] A "statistical" case might perhaps be defined as one based on such evidence, mainly quantitative, as to the state of the neutral country's commerce, as will indicate trade by it with the enemy in the commodity concerned and create a presumption, on quantitative grounds alone, that the particular consignment is part of or intended for such trade.

in the neutral country; and although *vis-à-vis* the neutral state, considered as a whole so to speak, it might be legitimate to condemn goods on the ground that they were destined to replace goods the neutral had chosen to re-export to the enemy, the difficulty is that the Prize Court is not as a rule dealing with the neutral state or government, but with the individual shipper or consignee of the goods, who is in most cases a private individual or firm or a company. The individual owner of the goods can disclaim all responsibility for any general excess of imports effected into the country as a whole, and claim that there is no proof that his particular goods have an enemy destination. In consequence, while excessive imports may raise a presumption of enemy destination, Prize Courts are liable to hesitate about proceeding to condemnation, unless, over and above the purely statistical evidence, there are grounds for thinking that the particular consignment itself is intended for the enemy. Furthermore, where there are in fact other circumstances of suspicion attaching to the shipment[1] the Court will prefer to rest condemnations largely on those grounds, or at any rate to include them as a prominent factor in the case, however strong it may already be on a statistical basis. This position is well illustrated by the case of *The Kim* (1 B and C.P.C. 405). There, the statistical case was overwhelming. Cargoes of lard on four ships bound for Copenhagen were in question and, in the words of Sir Samuel Evans (at p. 439)

"these vessels were carrying towards Copenhagen within less than a month more than thirteen times the quantity of lard which had been imported annually into Denmark for each of the three years before the war".

There was also evidence to shew that the imports of lard into the Scandinavian countries generally during the period concerned were no less than sixty times those for the corresponding pre-war period. This was coupled with evidence of an enormous drop in the shipments of lard from overseas to Germany direct (i.e. to German ports). Sir Samuel Evans, however, went on (*ibid.*):

"These facts give practical certainty to the inference that an overwhelming portion (so overwhelming as to amount to almost the whole) of the consignments of lard in the four vessels we are dealing with was intended for, or would find its way into, Germany. These, however, are general considerations, important to bear in mind in their appropriate place, but not in any sense conclusive upon the serious questions of consecutive voyages, of hostile quality, and of hostile destination, which are involved before it can be determined whether the goods seized are confiscable as prize."

Sir Samuel Evans then went on to review the particular facts and circumstances of suspicion relating to each individual consignment and finally concluded (*ibid.* at p. 483):

"Upon this branch of the case, for reasons which have been given when dealing with the consignments generally *and when stating the circumstances with respect to each claim* [italics added], I have no hesitation in stating my conclusion that the cargoes . . . were on their way at the time of capture to German territory as their actual and real destination".

[1] This, of course, is often the case, particularly where the statistical evidence is really strong: a fact which both endorses the soundness of the presumption of enemy destination based on statistical evidence alone, and at the same time tends to mask the statistical element in the case.

Despite the implied rejection of statistical evidence as a ground in itself for condemnation which appears to result from the decision in *The Kim*, later decisions of the Privy Council place the matter in a different light. It will be well however to begin by discussing statistical evidence as a ground *per se* for an initial *seizure*. Here there seems to be no doubt that statistical evidence alone will suffice, irrespective of any specific suspicion attaching to the individual consignment on other grounds. The difference between the position in this respect as regards seizure and as regards condemnation is well illustrated by the case of *The Baron Stjernblad* (3 B. and C.P.C. 17) in which the Prize Court refused to *condemn* a shipment of cocoa going to Sweden despite evidence that Swedish imports of cocoa had increased tenfold since the war and that a previously non-existent re-export trade with Germany in this commodity had developed. The grounds of the refusal were that a director of the Swedish importing firm had appeared and given oral evidence before the Court which satisfied it that the particular shipment would in fact be consumed in Sweden. But the Court refused to award the claimant any damages or costs. The claimant appealed against this refusal, but it was upheld by the Privy Council on the ground that "there were circumstances of suspicion calling for further inquiry, and amply sufficient to justify the seizure" (at p. 22). As there does not appear to have been any specific evidence against the goods themselves, but only a general state of affairs in which Sweden was known to be importing abnormal quantities of cocoa and to have developed a re-export trade in it to Germany, this decision appears to be an authority for the view that an adequate statistical case will by itself justify seizure. The claimants tried, in regard to the seizure, to make the same point that has been noticed above as constituting a strong argument against *condemnation* on statistical evidence only. To quote the Privy Council (*ibid.* at p. 19), they contended that:

"in considering whether there were circumstances of suspicion which justified the seizure, the Court must confine its attention to those circumstances for which the owner of the property seized is in some way responsible, and cannot take into consideration circumstances the existence of which is not due to any act or omission on the part of such owner or his agents or employees".

This view the Privy Council (*ibid.* at p. 22) roundly refused to accept, stating that their Lordships

"are of the opinion that this contention is wholly untenable. The question in every case is whether circumstances of suspicion exist and not who is responsible for their existence".

As regards the statistical case the Privy Council, after reviewing the facts, put the point as follows (p. 21):

"The position is therefore this. If the shipments of cocoa beans to Sweden be considered collectively, a considerable portion thereof must be destined for or find its way to Germany either by the re-export to Germany of the beans themselves or by the export to Germany of the various products of the beans. . . . The appellants then belong to a class of importers, some of whom must be engaged in a contraband trade, while others may not. It is impossible in any particular case to avoid suspicion, or to predicate with regard to any particular importer that his intention is innocent."

From this it will be seen that, given the statistical case, seizure will be justified in the purely negative circumstance that there is no evidence indicating the *innocence* of the particular consignment. As has been noticed, it is much less easy to apply the same principle in order to secure the final *condemnation* of the goods. Nor has it yet been done. *The Baron Stjernblad* does, however, suggest that it might be. It clearly implies that a general statistical case, unaccompanied by any circumstances tending to establish the innocence of the particular consignment, creates a prima facie presumption that the consignment is intended for the enemy. In *The Baron Stjernblad* this presumption was rebutted by oral evidence given by the importer which satisfied the Court that the consignment was in fact innocent. But if this evidence had not been forthcoming, it would seem that the presumption must have stood and that condemnation must have followed on the statistical evidence alone. This appears to result from what has now become a fundamental principle of Prize Law, at any rate as applied in English Prize Courts, that once adequate prima facie grounds of suspicion are shown by the captors to exist, the onus of clearing away this suspicion and establishing innocence lies on the claimant, and if he cannot discharge it the goods are liable to condemnation.[1]

The deductions thus drawn from *The Baron Stjernblad* are strongly supported by another decision of the Privy Council in the later case of *The Urna* (IX Lloyd's Reports of Prize Cases, 104). The facts and the principle involved are stated in the following passage from the judgment in that case (p. 114):

"A statistical table was put in evidence, which proved that in 1915 the imports into Denmark of dried fruits were 18,651 tons, whereas the annual average of imports before the war (1911–13) were 6,300 tons. The President has found that the statistical evidence established a case which throws upon the appellants the onus of showing that the goods were not going to Germany. Their Lordships concur in this opinion. There is ample statistical evidence to place an obligation on the appellants to show that the destination of the goods is innocent. The President further finds that it is impossible for him to say that the appellants have discharged the onus thrown upon them, and Their Lordships concur in this finding."

Actually there were certain independent grounds of suspicion attaching to the goods in *The Urna*, and therefore the condemnation, though resting mainly, did not rest exclusively, on a statistical basis. In consequence *The Urna* cannot be cited as a definite authority for condemnation on statistical evidence alone, and the above *dictum* is in some sense *obiter*. Nevertheless it seems virtually to establish that statistical evidence can by itself create a presumption of enemy destination, that the onus will then be on the claimant to show that the destination is innocent, and that if he cannot do this the goods will be liable to condemnation on the statistical evidence without any more.

The conclusion seems to be, therefore, that, although the Prize Court in the case of *The Kim* appeared to reject the possibility of a condemnation

[1] For the main cases establishing this principle (which, however, emerges inferentially from a great number of decisions) see p. 81 above. For a discussion of the principle see Garner's *Prize Law During the World War*, Section 396 *et seq.*; Colombos, *Law of Prize*, Section 172; also Erle Richards in *B.Y.* 1920–1 ("British Prize Courts and the War", pp. 25 *et seq.*).

on statistical grounds alone, the later cases of *The Baron Stjernblad* and *The Urna*, which were decisions of the Privy Council, seem to leave the way open for it, in an appropriate case. This does not of course mean, on the present run of the decisions, that a statistical case could ever be an *absolute* ground for condemnation. However abnormal the imports of the neutral country or clear the evidence that a large part of this trade was on enemy account, and though the particular consignment formed part of the excess imports over normal, these considerations would not overrule positive evidence that the particular consignment was in fact innocent, though they might make innocence much more difficult to establish.

THE MOST-FAVOURED-NATION STANDARD IN BRITISH STATE PRACTICE

By GEORG SCHWARZENBERGER, Ph.D., Dr.Jur.

Sub-Dean of the Faculty of Laws and Lecturer in International Law and Relations at University College, London

In the course of its growth, international law has evolved various standards of conduct which are of special significance for one of its most recent offshoots, namely, international economic law. These standards may be classified as the Minimum Standards of International Law, developed in bilateral treaties and, to some extent, in international judicial practice; the standards of the Open Door and of Equitable Treatment, laid down in a number of recent collective agreements; and, finally, the following standards which owe their origin largely to bilateral treaties: the standards of Reciprocity, National Treatment, Preferential Treatment and Most-Favoured-Nation Treatment. The present article is devoted to a discussion of the last-mentioned standard.

Most-favoured-nation treatment (for which the abbreviation m.f.n. treatment will be used in this article) has come to mean something very different from what that term prima facie suggests and—it may be added—what has been its original meaning: i.e. the treatment of a State as more favoured than any other. Used in its technical sense, the m.f.n. standard may be defined as treatment on a footing not inferior to that of the most favoured third State.[1]

This international standard is characterized by four elements inherent in the conception of m.f.n. treatment: (*a*) m.f.n. treatment is incompatible with any discrimination on the part of the promisor against the beneficiary and in favour of third States. M.f.n. treatment excludes preferential treatment of third States by the promisor.

(*b*) M.f.n. treatment does not exclude the grant by the promisor of additional advantages beyond those conceded to the most favoured third State. M.f.n. treatment is compatible with preferential treatment of the beneficiary by the promisor.

(*c*) States other than the promisor and beneficiary form the *tertium comparationis*. M.f.n. treatment requires the absence of discrimination as compared with third States. It does not imply either national or reciprocal treatment of the beneficiary.

(*d*) M.f.n. treatment does not demand compliance with any definite and objective rules of conduct. The rights actually enjoyed under the standard are merely the counterpart of the rights granted by the promisor to third States. In the absence of undertakings to third States, the m.f.n. standard is but an empty shell, and, in operation, it is a shell with variable—and continuously varying—contents.

[1] "Treaty concluded with" means a treaty between this country with the State mentioned. On the meaning and scope of this field of international law, see the present writer's "The Development of International Economic and Financial Law by the Permanent Court of International Justice", *Juridical Review*, 54 (1942), pp. 21 *et seq.*

I. *The Functions of the Most-Favoured-Nation Standard*

The m.f.n. standard forms one of the basic standards of international law, and it is not surprising that it can be traced back to the dawn of international law. Leaving aside earlier Imperial grants of customs privileges to cities within the Holy Roman Empire on the basis of favours obtained "by whatsoever other town",[1] the principles of m.f.n. and national[2] treatment make their first appearance in international law proper in the commercial treaties concluded during the twelfth century between England and Continental powers and cities.[3] A typical instance of the early formulation of the m.f.n. clause on a basis of reciprocity is presented by the Treaty between Henry V and the Duke of Burgundy and Count of Flanders of 17 August, 1417, in accordance with which "*les Maistres de Neifs et Maronniers de la Partie d'Engleterre, a leur venue es Ports et Haures de nôtre dit Pays de Flandres, porront faire licitement lier leur Neifs, es dis Ports et Haures, par la Maniere que feront Francois, Hollandois, Zellandois, et Escohais, sans encourir pour ce en aucune Fourfaiture on Amende: Et semblablement, porront faire les Maistres de Niefs et Maroniers de Flandres es Ports et Haures de la Partie d'Engleterre*".[4] By the end of the fifteenth century, English practice had evolved what is substantially the modern usage in the formulation of the m.f.n. standard. The privileges granted to the beneficiary are no longer necessarily defined with reference to one or several specifically named countries, the most favoured nations in the original meaning of the term. Thus, under the Treaty with Denmark of 1490, English merchants and other lieges of the King of England "*Regna Daciae et Norwegiae et alia Dominia sub Parte nostra existentia intrantes, in suis Personis Bonis Mercantiis et aliis Rebus quibuscumque, Veniendo et Redeundo, Stando et Conversando, Emendo et Vendendo, Piscando, ac etiam mercandizando, habeantur et sint ita liberi et Quieti Privilegiati et Immunes sicut aliqui alii Mercatores seu Homines Extranei, quacumque seu qualiacumque Libertates seu Privilegia de Gratia Usu vel Consuetudine infra Regna vel Dominia praedicta habentes vel obtinentes, cujuscumque fuerint status, Conditionis, Linguae seu Nationis, absque Molestatione, Exactione, Onere seu Impedimento aliquali*".[5]

It is not possible within the compass of this article to trace step by step the history of the m.f.n. standard in English treaty practice. Yet it may safely be stated that the principle of m.f.n. treatment has not been absent from any of the stages of its evolution. It has been found congenial to the centuries of medieval trade and of mercantilist capitalism. It has adapted

[1] B. Nolde, "La Clause de la Nation la plus Favorisée et les Tarifs Préférentiels", *Recueil de l'Académie de la Haye*, vol. 39 (1932—vol. I, p. 25.)

[2] Cf. below under VIII, p. 118.

[3] Referring to G. F. Sartorius Freyherr von Waltershausen, *Urkundliche Geschichte des Ursprungs der deutschen Hanse*, Hamburg, 1830, vol. II, p. 3 (which, unfortunately, was not accessible for consultation), in his *Wirtschaftliche Gleichberechtigung*, Berlin, 1937, H. J. Held mentions agreements between this country and Cologne, concluded between 1154 and 1189, which are not recorded in the collections of Rymer or Dumont (*l.c.*, p. 17, note 2).

[4] Th. Rymer, *Foedera*, London 1727–35 (subsequently *Rymer*), vol. IX, p. 484. See also the Treaties with Flanders, Ypres, and Brabant of 17 August, 1447 (*ibid.*, vol. XI, p. 144) and with Burgundy of 5 January, 1467 (*ibid.*, vol. XI, pp. 596 and 610).

[5] *Rymer*, vol. XII, p. 383. Cf. also the Treaties with Florence of 1490 (*ibid.*, p. 391), with Burgundy of 1495 (*ibid.*, p. 581), and with Riga of 1494 (*ibid.*, pp. 702–3).

itself to cycles of expanding and contracting trade and, though it has flourished more than ever before and after in the era of free trade, it has been found that neither partial nor total State control of foreign trade render it necessary to dispense with the m.f.n. standard.[1] In the words of the Committee of Experts for the Progressive Codification of International Law, "nations do not seem able to escape the use of the clause".[2] The types, formulation and scope of the m.f.n. standard have varied in the eight hundred years of its history. Yet what is remarkable is not the fact of such fluctuations, but the constant character of the m.f.n. standard. Its permanent use suggests that there is something basic in this international pattern of conduct. It indicates that the m.f.n. standard answers to constant needs of international society, and it suggests that the functions fulfilled by the standard are not essentially affected by the peculiarities of time or place or by differences in social and economic systems. As in other spheres, the significance to international law of such differences and "ideological" cleavages between States need not be unduly magnified. They are much less relevant than the realities of the, so far, remarkably enduring structure of the international society, the motive powers constantly at work behind it and the atmosphere and outlook which this peculiar environment impresses upon the members of the inter-State system. What is essential from our point of view is the individualistic and acquisitive character of the international society, coupled, as it is, with the growing interdependence between nations.[3]

While the maxim *pacta tertiis nec nocent nec prosunt* seems to correspond with these characteristics, none of the members of the international society can help being acutely interested in—and possibly vitally affected by—the arrangements made between other States and the concessions made by them to each other.[4] Though any State is well content to be treated by another on more favourable terms than any third State and does not object to discrimination practised in its favour, everyone of them must be continuously on its guard against any more successful competitor. However, assuming that States are prepared to exchange a condition of unceasing vigilance and

[1] Cf. E. A. Korovine, "Soviet Treaties and International Law", *American Journal of International Law*, (subsequently A.J.I.L.) 22 (1928), pp. 754–5, and T. A. Taracouzio, *The Soviet Union and International Law*, New York, 1935, pp. 257 *et seq.* This point may be illustrated by reference to the treaty policy of the U.S.S.R. For recent instances of the stipulation of m.f.n. treatment in the treaty practice of the U.S.S.R., see the Treaty of Commerce with Latvia of 4 December, 1933, Art. 1 (*League of Nations, Treaty Series*, vol. 148 (1934), p. 163); the Customs Convention with Italy of 6 May 1933, Articles 1–4 (*ibid.*, vol. 158 (1935), pp. 55–6); the Provisional Commercial Agreement with France of 11 January, 1934, Articles 7 and 9 (*ibid.*, vol. 167 (1936), pp. 380 and 382); the Treaty of Commerce and Navigation with Czechoslovakia of 25 March 1935, Articles 1, 3, 5, 6, 11 and 15 (*ibid.*, vol. 161 (1935), pp. 287 *et seq.*); the Consular Convention with Czechoslovakia of 16 November, 1935, Art. 20 (*ibid.*, 169 (1936–7), p. 157); the Treaty of Establishment, Commerce and Navigation with Iran of 27 August, 1935, Articles 1, 3, 4, 11 and 12 (*ibid.*, vol. 176 (1937), pp. 301, 303 and 313); the Provisional Commercial Convention with Belgium and Luxemburg of 5 September, 1935, Articles 1, 3, 4, 5, and 16 (*ibid.*, 173 (1936), pp. 182, 183, and 186); the Agreement with Poland regarding Port Dues of 31 March, 1936, Articles 1 and 2 (*ibid.*, 186 (1938), pp. 215–16; the Commercial Agreement with the United States of America of 4 August 1937 (*ibid.*, 182 (1937–8), p. 114; and see below under VI, pp. 112 *et seq.*).

[2] League of Nations, 1927, V. 10, p. 12. Cf. also 1933, II. B. I, and 1936, II. B. 9.

[3] Cf. the present writer's *Power Politics*, London, 1941, pp. 172 *et seq.*

[4] See Secretary Sherman's Letter to Mr. Buchanan of 11 January, 1898, Moore, *Digest of International Law*, vol. V, p. 278, and, similarly, Secretary Hull's Letter to President Roosevelt of 10 May, 1935, Hackworth, *Digest of International Law*, vol. V, p. 293.

never-ending uneasiness for the safer and more dignified position in which anybody's advantage accrues to everybody's profit, the standard of m.f.n. treatment is the very means to this end. It generalizes automatically the advantages granted by one State to any other included in the m.f.n. arrangement. Thus its main function consists in forming an agency of equality. It prevents discrimination and establishes equality of opportunity on the highest possible plane: the minimum of discrimination and the maximum of favours conceded to any third State. How much the achievement of this object means to the chancelleries concerned may be gauged from the language of older treaties which, more openly than modern treaties in this sphere, reveal the particular jealousies and the actual competitors whom the contracting parties had very consciously in mind. To choose an instance at random, it is stipulated in the Treaty of Peace and Commerce between Denmark and the United Kingdom of 13 February, 1660–1, that "if the Dutch or any other nation whatsoever (the Swedish only excepted) hath already obtained, or hereafter shall obtain, of the King of Denmark and Norway, any better agreements, covenants, exemptions, and privileges than those contained in this treaty, the same and such like shall be communicated and effectually granted, freely and with all fulness, to the King of England and to his subjects; and on the other side, if the Dutch or any other nation whatsoever, hath obtained, or shall hereafter obtain, of the King of England, any better agreements, covenants, exemptions, or privileges than those contained in this treaty, the same and such like shall be communicated and effectually granted, freely and with all fulness to the King of Denmark and Norway, and to his subjects."[1]

Whatever has been or may be the internal political, social or economic structure of sovereign States, the egalitarian function of the standard corresponds to one of their permanent interests. This explains the historical continuity in the application of the m.f.n. standard. Yet what is continuity in time is universality in space. The standard of m.f.n. treatment is the common denominator on which primitive and developed countries, agricultural and industrial economies as well as capitalist and socialist States can meet, and the very indefiniteness and elasticity of the standard promotes its universal applicability.

There are, however, additional functions which are fulfilled by the m.f.n. standard. It is clear that m.f.n. clauses serve as an insurance against incompetent draftsmanship and lack of imagination on the part of those who are responsible for the conclusion of international treaties. While it is thus true that the standard of m.f.n. treatment has the effect of putting the services of the shrewdest negotiator of a third country gratuitously at the disposal of one's own country, another aspect of the matter is more significant. The international society is highly dynamic and is involved in a continuous process of integration, disintegration and transformation. Thus unforeseen problems necessarily arise and changes occur which make desirable the adaptation of treaties to changed circumstances. As long as a country is content to enjoy treatment equal to that of the most-favoured third country, and the subject-matter of the treaty lends itself to such treatment, the use of the m.f.n. standard leads to the constant self-adapta-

[1] Art. 24. Hertslet, *Commercial Treaties* (subsequently *Hertslet*), vol. I, p. 186.

tion of such treaties and greatly contributes to the rationalization of international affairs.

Thus the functions of the m.f.n. standard may be described as the elimination of discrimination, the correction of oversights and the adaptation of treaties to changing circumstances. The indefiniteness and elasticity of the standard and the automatic nature of its operation are characteristics of the standard which have made possible the continuity and universality of its application.

II. *The Types of Most-Favoured-Nation Clauses*

Much ingenuity has been spent on the best possible classification of m.f.n. clauses. Yet the test of any classification is whether it helps to clarify the subject or rather has the opposite effect. By way of an antidote to the tendency towards over-classification,[1] it is proposed in this paper to limit possible distinctions to two types of m.f.n. clauses and to discuss questions arising from any additional types in connection with the legal structure,[2] the scope of, and exceptions[3] from, the m.f.n. standard.

(*a*) *Unilateral and Bilateral M.F.N. Clauses.* In view of the fact that relations in the spheres to which m.f.n. treatment generally applies[4] are commonly based on the principle of reciprocity, the unilateral type of the clause is of an exceptional character. In British treaty practice, this type is to-day mainly of historical significance. It is limited to relations with countries which, at the time, were in the border-zones of Western civilization[5] —even to some of these States, Great Britain has granted at an early stage reciprocal treatment[6]—or with defeated countries during a transitional period from war to peace.[7]

However formulated, in substance, the bilateral m.f.n. clause represents a combination of two m.f.n. clauses on the basis of reciprocal obligations of the contracting parties. Frequently it is expressly stated that the parties

[1] Cf. M. L. E. Visser, "*La Clause de la Nation la plus favorisée dans les Traités de Commerce*", *Rev. Dr. Int. et Lég. Comp.*, 2nd series, 4 (1902), pp. 66 *et seq.*, pp. 159 *et seq.*, and pp. 270 *et seq.*; E. Lehr, "*La Clause de la nation la plus favorisée*", *ibid.*, 12 (1910), pp. 658 *et seq.*; St. K. Hornbeck, "The Most-Favoured-Nation Clause", *A.J.I.L.*, 3 (1909), pp. 395 *et seq.*; T. E. Gregory, *Tariffs: A Study in Method*, London, 1921, pp. 450 *et seq.*; N. Ito, *La Clause de la Nation la plus favorisée*, Paris, 1930, pp. 118–19.

[2] Cf. below under III, pp. 102 *et seq.*

[3] Cf. below under IV, pp. 106 *et seq.*, and under V, pp. 109 *et seq.*

[4] Cf. below, p. 106.

[5] Turkish Capitulations of 1675, Articles 18 and 44 (Hertslet, II, pp. 350 and 357); Treaty with Morocco of 8 April, 1791, Art. 15 (*ibid.*, I, pp. 116–17); Treaty with the Chiefs of Samo (Africa) of 20 May, 1845, Article 14 (*ibid.*, VII, p. 59); Treaty with the Chief of Manna (Africa) of 1 January, 1847, Art. 4 (*ibid.*, VIII, p. 4); Treaty with the Sultan of Borneo of 27 May, 1847, Art. 2 (*ibid.*, pp. 86–7); Treaty with Japan of 14 October, 1854, Art. 5 (*ibid.*, IX, p. 978); Treaty with Siam of 18 April 1855, Art. 10 (*ibid.*, X, pp. 561–2).

[6] Treaty with Morocco of 28 July, 1760, Art. 12 (*ibid.*, I, p. 105); Treaty with Muscat of 31 May, 1839, Arts. 1 and 3 (*ibid.*, V, pp. 611–12); Treaty with the Sandwich Islands of 1 July, 1843, Arts. 1 and 8 (*ibid.*, VII, pp. 960 and 965); Treaty with Abyssinia of 2 November, 1849, Arts. 4 and 9 (*ibid.*, IX, pp. 1–2); Convention with China (regarding Burma and Tibet) of 1 March, 1894, Art. 17 (87 Br. and For. St. Papers (1894–5)), p. 1311.

[7] Peace Treaties of St. Germain with Austria, Arts. 220 and 228b; of Neuilly with Bulgaria, Arts, 150, 152, and 156b; of Versailles with Germany, Arts. 264–7; and of Trianon with Hungary, Arts. 203 and 211b.

intend to establish a "strict", "perfect" or "complete" system of reciprocity,[1] that they grant m.f.n. treatment "on condition of reciprocity",[2] or that it is "their intention to secure to each other reciprocally the footing of the most favoured foreign country".[3] The equivalent of the grant of m.f.n. treatment does not necessarily consist in the reciprocal grant of the same status, but may consist in concessions of a different kind.[4] Yet in the absence of evidence to the contrary, the presumption is that m.f.n. treatment is given and taken on condition of reciprocity, and that the contracting parties intend to use the bilateral m.f.n. clause.[5]

(*b*) *Conditional and Unconditional M.F.N. Clauses.* In accordance with the conditional formulation of the m.f.n. clause, favours granted to a third State in return for a compensation accrue to the beneficiary only in consideration of an equivalent concession. Under the unconditional clause, the beneficiary partakes simultaneously and automatically, without request and without compensation, of any favour granted to a third State. Or to put the issue in the words of a report made in 1848 by the Law Officers of the Crown, the question is whether a beneficiary "can claim the Boon without the Price, or whether the Price must not be taken to be an inherent element of the Boon".[6]

With the exception of the relatively short period between 1810 and 1857 during which Great Britain concluded a number of commercial treaties based on the conditional type of the m.f.n. clause,[7] this country has been the steadfast champion of unconditional m.f.n. treatment.[8] In 1923, it had the satisfaction of witnessing the conversion to this principle of the United States of America[9] who, until then, had with equal determination taken her stand on the basis of the conditional clause.[10]

[1] Treaty with Denmark of 11 July, 1670, Art. 40 (*Hertslet*, I, p. 201); Treaty with Spain of 28 November, 1713, Art. 11 (*ibid.*, II, p. 205); Treaty with Portugal of 19 February, 1810, Arts. 7 and 25 (*ibid.*, pp. 35 and 57); Treaty with Mexico of 26 December, 1826, Art. 11 (*ibid.*, III, p. 252); Treaty with Uruguay of 26 Aug., 1842, Art. 10 (*ibid.*, VI, p. 932); Treaty between Egypt and Palestine of 6 June, 1928 (*L.o.N., T.S.*, vol. 80 (1928), p. 279).

[2] Treaty with Albania of 10 June, 1925 (*L.o.N., T.S.*, vol. 43 (1926), p. 82.)

[3] Treaty with Turkey of 1 March, 1930, Art. 7 (*ibid.*, vol. 108 (1930), p. 412.)

[4] Treaty with France of 30 May, 1814, Art. 12 (*Hertslet*, I, p. 253); British Order in Council (Prussian Trade with British Colonies) of 3 May, 1826 (*ibid.*, III, p. 360); Treaty with Oldenburg of 4 April, 1844, Art. 5 (*ibid.*, VI, pp. 585–6).

[5] Cf. the Exchange of Notes between France and Great Britain modifying the Anglo-French Convention relative to Tunis of 18 Sept., 1897, 8 and 23 March, 1919 (Permanent Court of International Justice, Series C 2, pp. 99–100, at p. 100) and H. Isay, "*Meistbegünstigungs-und Gleichberechtigungsklauseln im internationalen Recht*", *Zeitschrift für Völkerrecht*, 12 (1923), pp. 278–9.

[6] Sir Arnold McNair, *The Law of Treaties*, Oxford, 1938, p. 287.

[7] Treaties with Portugal of 19 Feb., 1810, Art. 2 (*Hertslet*, II, p. 29), and of 3 July, 1842, Art. 4 (*ibid.*, VI, pp. 601–2); Treaty with the Two Sicilies of 29 April, 1845, Art. 6 (*ibid.*, VII, pp. 973–4); Treaty with Ecuador of 3 May 1851, Art. 4 (*ibid.*, IX, p. 243); Treaty with the Sandwich Islands of 10 July, 1851, Art. 3 (*ibid.*, p. 686).

[8] Cf. Commercial No. 3 (1907) [Cd. 3395] and Foreign Office, *Handbook of Commercial Treaties with Foreign Powers*, London, 1931.

[9] Cf. the Exchange of Letters between Secretary Hughes and President Harding and the Instructions of Secretary Hughes to American diplomatic officers of 18 August, 1923 (Hackworth, *l.c.*, vol. V, pp. 271 *et seq.*). See also J. D. Larkin, *The President's Control of the Tariff*, Cambridge (Mass.) 1936, pp. 54 *et seq.*

[10] Cf. S. B. Crandall, *Treaties*, Washington, 1916, pp. 404 *et seq.*, Ch. Ch. Hyde, *International Law*, Boston, 1922, vol. II, pp. 73 *et seq.*, and B. H. Williams, *Economic Foreign Policy of the United States*, New York, 1929. The chief European supporters of the conditional interpretation were F. von Martens, *Völkerrecht*, Berlin, 1883, vol. II, p. 225, and J. Westlake, *International Law*, Cambridge, 1904, Part I, p. 283. On the exceptional position granted to Switzerland, see

The chief disadvantage of the conditional clause is that it deprives the m.f.n. standard of its automatic operation and reduces the right of the beneficiary to that of a party to a *pactum de contrahendo*. Furthermore, the conditional clause opens the door to easy circumventions of the obligations undertaken by the promisor and it causes difficulties in achieving agreement as to what constitutes an equivalent concession. Finally, the uncertainty and complication thus introduced into international treaty relations no longer serve any purpose once the promisor grants unconditionally to any third State privileges previously granted conditionally to other States; for then the beneficiaries under conditional clauses, too, may claim gratuitous participation in the gratuitously bestowed favour. If the promisor wishes to avoid this result, his hands are tied once and for all and he is prevented in future from applying—and himself benefiting from—the unconditional type of m.f.n. treatment.

Bearing in mind the drawbacks resulting from the conditional interpretation of the m.f.n. treatment, Earl Granville expressed the view that the conditional type of m.f.n. treatment constituted "an infraction of the most-favoured-nation clause as hitherto interpreted in the law of nations".[1] While this dictum may overstate the position, there is much to be said for the view that a type of m.f.n. clause which, to a large extent, deprives it of its automatic operation and, instead of eliminating discrimination, is actually conducive to it, cannot claim to be considered as a m.f.n. clause proper. From this it seems to follow that, in principle, m.f.n. clauses ought to be interpreted unconditionally. This was the line taken by the Marquess of Salisbury: "Her Majesty's Government holds that those clauses have the same meaning whether that word[2] be inserted or not".[3] But this rule of interpretation must be qualified by the exception that it cannot be applied against a country which, as a matter of common knowledge, has adopted the conditional type as a principle of national treaty policy.

III. *Legal Source and Structure of the Most-Favoured-Nation Standard*

A host of problems arise when the m.f.n. standard is subjected to analytical scrutiny. However, the discussion must be limited here to three main issues: the source of the standard, some aspects of its legal structure, and the question of the identification of the beneficiary of m.f.n. treatment.

(*a*) *Source of the M.F.N. Standard.* It is probably futile to attempt to derive claims to m.f.n. treatment from the principle of freedom of commerce.

[*Note continued from previous page.*]

Crandall, *l.c.*, p. 382; on the French origin of the conditional type of the m.f.n. clause, see V. G. Setser, "Did Americans Originate the Conditional M.f.n. Clause?", *Journal of Modern History*, 5 (1933), pp. 322–3; on the reasons for the popularity of the conditional interpretation in the United States, see W. S. Culbertson, *Commercial Treaties*, Encyclopaedia of Social Sciences, vol. 24, p. 27.

[1] In his Dispatch of 12 February 1885 to the British Minister in Washington, Parl. Papers, 1884–5. LXXI (Commercial No. 4 (1885)), p. 97.

[2] "Unconditionally".

[3] Note of 27 July 1885 to the Venezuelan Minister in London (77 Br. and For. St. Papers (1885–6), p. 796).

In the first place, though widely recognized in treaties by which States grant to each other reciprocal freedom of commerce,[1] it cannot be admitted that that principle has as yet developed into a rule of customary international law.[2] Even if it were held that freedom of commerce were a generally accepted principle of law, all the principal standards of international economic law[3] are compatible with it. It would, therefore, be impossible to determine the nature and scope of any one of these standards by reference to the all-embracing notion of freedom of commerce. This necessarily leads to the conclusion that treaties, bilateral or multilateral,[4] must be the foundation of m.f.n. treatment. It is true that there are cases in which States have granted m.f.n. treatment by autonomous action. Yet this means either that there exists a tacit agreement between the States concerned, or that the beneficiary cannot of right claim such treatment.

The stipulation of m.f.n. treatment is usually compressed into the so-called m.f.n. clause or clauses of a treaty. Yet not infrequently the whole of the treaty is concerned with the grant of m.f.n. treatment.[5] It is well to keep in mind the warning voiced by Judge Anzilotti[6], and more recently by Sir Arnold McNair, that "speaking strictly, there is no such thing as *the* most-favoured-nation clause: every treaty requires independent examination".[7] While this rule certainly applies to questions related to the scope of, and exceptions from, concrete m.f.n. clauses, it cannot—and is not meant to—give any guidance in cases in which, in a rather summary fashion, States grant each other m.f.n. treatment.[8] Legal issues between the parties may then have to

[1] Cf. the Treaty with France of 25 April, 1606, (J. Dumont, *Corps universel du droit des gens* Amsterdam and The Hague, 1726–31 (subsequently Dumont), vol. V, Part II, p. 632; Treaty with the United Provinces of 1608, Art. 6 (*Rymer*, vol. XVI, p. 675); Treaty with France of 3rd Nov., 1655 (*Dumont*, vol. VI, Part II, p. 121); Treaty with Spain of 23 Mar., 1667, Art 4 (*Hertslet*, II, p. 141); Treaty with Spain of 28 Nov., 1713, Art. 2 (*ibid.*, p. 205); Treaty with the United States of America of 3 July, 1815, Art. 1 (*ibid.*, p. 387). Similar clauses may be found, too, in most of the more recent commercial treaties concluded by the United Kingdom. See *l.c.* in note 8, page 101.

[2] Even the naturalists did not maintain more than that freedom of trade was an imperfect, right or, as in the case of Gentili, Grotius and Zouche, they interpreted the conception rather narrowly or as subject to all important exceptions. Cf. Victoria, *De Indis Noviter Inventis* (1532), Section III, titles 1–7 (J. B. Scott, *The Spanish Origin of International Law*, Oxford, 1934, pp. XXXVI–XXXVII); Grotius, *Mare Liberum* (1609), New York, 1916, pp. 7 and 64; Gentili, *De Jure Belli Libri Tres* (1612), Bk. I, Ch. XIX, Oxford, 1933, pp. 89–90; Zouche, *An Exposition of Fecial Law and Procedure* (1650), Part II, Section V, 9, Washington, 1911, pp. 109–10; Pufendorf, *Elementorum Jurisprudentiae Universalis Libri Duo* (1672), Bk. I, 5, Oxford, 1931, pp. 12–13; Vattel, *Le Droit des Gens* (1758), Bk. II, Ch. II, paragraphs 23 and 25, Washington, 1916, pp. 121–2; Wolff, *Jus Gentium Methodo Scientifica Pertractatum* (1764), Ch. II, par. 189, Oxford, 1934, p. 99. See also Qu. Wright, "*International Law and Commercial Relations*", Proceedings of the American Society of International Law, Washington 1941, p. 37.

[3] See above, p. 96.

[4] Though, as a rule, m.f.n. treatment is the subject of bilateral treaties, this is not exclusively so. See the Protocol between Great Britain, Spain and Germany regarding the Sulu Archipelago of 11 March, 1877, Art. 3 (*Hertslet*, vol. XIV, p. 515); the Convention between Great Britain, Austria-Hungary, Belgium, &c., of 3 July, 1880, Art. 17 (71 Br. and For. St. Papers (1879–80), p. 644); the Convention and Statute on the International Régime of Maritime Ports of 9 Dec. 1923, Art. 2 (*L.o.N., T.S.*, vol. 58 (1926), p. 301); or the Ouchy Convention between Belgium and The Netherlands (open to all States) of July 18, 1932, Art. 5: "The High Contracting Parties undertake to apply to their reciprocal exchanges the unconditional and unlimited régime of the most-favoured-nation" (M.O. Hudson, *International Legislation*, vol. VI, p. 98).

[5] Cf. the Treaty with Egypt of 3 March 1884 (*Hertslet*, vol. XVII, p. 337) or the Treaty with Brazil of 10 August, 1936 (*L.o.N., T.S.* 172 (1936), p. 274).

[6] *Corso di diritto internazionale* (French transl., 1929), p. 438.

[7] *L.c.*, p. 285, note 1.

[8] Cf. the Treaties between New Zealand and Sweden of 24 May 1935 (*L.o.N., T.S.*, 159 (1935), p. 144) or between the Union of South Africa and Egypt of 8 May, 1939 (*ibid.* vol. 198 (1939), p. 296).

be solved by reference to the m.f.n. standard as such. Though there is no such thing as *the* m.f.n. clause, it is equally necessary to emphasize that there is such a thing as *the* m.f.n. standard. As has happened in the case of the minimum standards of international law, the m.f.n. standard owes its clarification to innumerable individual treaties by which it has been developed. The application of the m.f.n. standard in inter-State relations depends on agreement to this effect. Yet the m.f.n. standard and its four inherent elements[1] are clear and definite enough to permit the determination of controversies between parties to such agreements.

(*b*) *Legal Structure of the M.F.N. Standard.* The object of any attempt to give legal expression to the m.f.n. standard is to enable the beneficiary automatically to acquire the rights, present and future, granted by the promisor to any third State. The device by which this end can be achieved most conveniently is to consider the relevant stipulations of treaties between the promisor and third States as automatically becoming part of the treaty between the promisor and the beneficiary. As in other spheres of municipal and international law,[2] so here the resort to legal fictions has enabled draftsmen to popularize a new legal principle.[3] Again, in accordance with the general trend in the growth of legal systems, once the new principle had been widely accepted, the fiction could be discarded and the new standard openly proclaimed.

As stated in the British-Japanese Convention of 14 October 1854, the privileges granted by the promisor to third States accrue to the beneficiary "as of right".[4] Unless renounced by him,[5] the beneficiary continues to enjoy these privileges as long as the treaty between the promisor and the third State continues in operation, or as long as the promisor actually grants these rights to the third State.[6] It is of no consequence on what ground the third

[1] See above, p. 96.

[2] For other instances of the use of fictions as agencies of the development of international law, cf. the present writer's "Diplomatic Immunity", *Modern Law Review*, V (1941), p. 64, and *International Law and Totalitarian Lawlessness*, London 1943, p. 99.

[3] Thus, *e.g.*, it is provided in Art. 38 of the Treaty with Spain of 13 May, 1667, that "the people and subjects of either of the said kings shall have and enjoy in the lands, seas, ports, havens, roads, and in all other places whatever, all the same privileges, securities, liberties and immunities, whether they concern their persons or trade, which have been already granted, or hereafter shall be granted, by either of the said kings, either to the most *Christian* king or to the *States General* of the *United* Provinces or to the *Hansetowns*, or to any other kingdom or state whatsoever, by their treaties or royal cedulas with all the beneficial and favourable articles and clauses contained in such grants, in as ample manner and form, and to as full and valid effect, as if the same were particularly transcribed and inserted in this present treaty" (*Dumont*, vol. VIII, Part I, p. 32). Or cf. the Treaty with Savoy of 19 Sept., 1669, Art. 15 (*Dumont*, vol. VII, Part I, p. 119).

[4] Art. 5 (*Hertslet* vol. IX, p. 980).

[5] Cf. the British Note of 26 May, 1882, renouncing the rights of Great Britain under the Treaty between Portugal and Transvaal of 1 Dec., 1875 (*ibid.*, vol. XV, pp. 296–8).

[6] Principles which become at a later stage commonly accepted and are taken for granted are usually fully set out in the earlier treaties. Thus it is stipulated in Article 18 of the Treaty with Denmark of 16 Feb. 1660–1 that "the people and subjects of the King of England shall have, possess and enjoy all and singular the things contained and granted in this article, without any molestation and interruption, so long and during all the time that the subjects or any of the people of the United Provinces of the Netherlands have, possess, and enjoy, or ought, or might have, possess, or enjoy the same, or the like, by any treaty, covenant, agreement, or permission, whatsoever made or to be made" (*ibid.*, vol. I, pp. 183–4). The position, however, is different in the case of treaty-making by reference. Then the enjoyment of the advantages by the beneficiary continues irrespective of the subsequent cancellation or obsolescence of the treaty between the promisor and the third State. Cf. the Report by the Law Officers of the Crown of 25 October, 1872 (McNair, *loc. cit.*, pp. 304–5).

State's favour is based, be it "law or treaty, convention or agreement"[1] or merely a privilege bestowed *de facto* on the third State. As, however, foreign countries normally form the *tertium comparationis*, the positive formulation of m.f.n. clauses prevents, as a rule, the beneficiary from claiming m.f.n. treatment with respect to State contracts between the promisor and foreign companies or with international trusts and cartels.[2]

In the formulation of the m.f.n. standard, British State practice makes equal use of positive and negative m.f.n. clauses. With the growth of intensive contacts and in periods of expanding international co-operation, the emphasis lies more on "whatsoever privileges, advantages, favours, or immunities have been or may hereafter be accorded" to other States[3] than on the negative formulation of the m.f.n. standard. Yet even when conditions do not encourage the generalization of favours, the m.f.n. principle can still fulfil its constant minimum function and assure the absence of discrimination against the beneficiary. In this form, the standard guarantees to the beneficiary as a minimum the status of the least disfavoured country. Thus, in their Temporary Commercial Agreement of 1936, Brazil and the United Kingdom promised each other that the goods produced and manufactured in either country "shall not be subject on importation, or subsequently, to other or higher customs duties or charges, to other prohibitions or restrictions, to other or more onerous customs formalities or licensing requirements than those to which like goods, the produce or manufacture of any other foreign country, are subject."[4]

(*c*) *The Beneficiary of the M.F.N. Standard.* According to the clear text of a great number of treaties concluded by this country and providing for m.f.n. treatment, there is no doubt as to the intention of the contracting parties in this respect. Thus it is stipulated in Article 1 of the Commercial Treaty between France and the United Kingdom of 28 February 1882 that both countries "guarantee to each other most-favoured-nation treatment."[5] Yet, in view of the British practice of making provision in commercial treaties for the protection of the person and property of individuals,[6] there are equally frequent clauses which speak of the rights of individuals to m.f.n. treatment.[7] Nevertheless it would not be advisable to draw from this fact hasty conclusions regarding the international personality of individuals. Many of these treaties refer exactly in the same manner to goods which are to receive treatment not less favourable than that granted to goods of any other

[1] Treaty with Guatemala of 6 June, 1931, Art. 10 (*L.o.N., T.S.*, vol. 132 (1932), p. 20).

[2] Cf. the Report by the Queen's Advocate of 5 May, 1853 (McNair, *loc. cit.*, pp. 303–4); the Exchange of Notes with Guatemala of 22 February, 1928 (*L.o.N., T.S.*, vol. 97 (1929), pp. 237–9); the Agreement between Greece and Spain of 11 July, 1932 (*ibid.*, vol. 148 (1934), p. 399), *L.o.N.*, 1927, V. 10, p. 6, and Qu. Wright, "The Most-Favored-Nation Clause", *A.J.I.L.*, 21 (1927), p. 761.

[3] Treaty with Spain of 8 Jan., 1886, Art. 2 (*Hertslet*, vol. XVII, p. 1019).

[4] *L.o.N., T.S.*, vol. 172 (1936), pp. 276–7.

[5] *Hertslet*, vol. XV, pp. 184–5. See also Art. 2 (*ibid.*, p. 185), or the Treaty with Persia of 2 May, 1857, Art. 9 (*ibid.*, vol. X, p. 949, and *loc cit.* in note 8, p.101 above).

[6] Sir William Malkin, "International Law in Practice", *Law Quarterly Review*, 49 (1933), p. 489.

[7] See, *e.g.*, the Treaty with Spain of 3 Dec., 1715 (*Hertslet*, II, p. 223) and *loc cit.* in note 8, page 101.

foreign country[1] and to the treatment on such a footing of ships[2] or aircraft.[3] British treaty practice does not make any recognizable distinction between individuals and other objects of international law; it certainly does not offer any evidence for their international subjectivity. The most that may be inferred from some of these clauses is that it has been the intention of the contracting parties automatically to transform their mutual obligations towards the subjects of the other party into rules of municipal law and thus to endow their nationals with rights mutually enforceable in each other's countries. In the absence of obstacles presented by English law in cases in which it may require additions to, or alterations of, the existing law for the enforcement of a particular treaty,[4] such a construction of m.f.n. clauses in favour of individuals may draw support from the Advisory Opinion of the Permanent Court of International Justice on the *Jurisdiction of the Courts of Danzig* (1928).[5]

IV. *Scope of the Most-Favoured-Nation Standard*

The scope of m.f.n. treatment varies considerably in accordance with the national needs and policies of the States applying it. Though the principle of reciprocity affords a certain amount of protection to smaller States,[6] they may challenge the limitations imposed on the m.f.n. standard by the greater Powers only at the risk of being excluded from the benefits of the standard in extensive areas of the world. Thus, in spite of the treaty basis of the m.f.n. standard, the m.f.n. policies of world and greater Powers show clearly distinctive features. It is proposed to sketch the peculiarities in this respect of British m.f.n. policy and to examine the personal, territorial, temporal and functional aspects of the scope of the m.f.n. standard, as applied in British State practice.[7]

[1] See, *e.g.*, the Treaty between Brazil and India of 21 July, 1932, Art. 1 (a), (*L.o.N.*, *T.S.*, 130 (1932), p. 94). A curious formulation of the rights of another category of potential candidates for international personality may be found in Part I (2) of the Protocol forming part of the Agreement between Estonia and the United Kingdom of 11 July, 1934 (*L.o.N.*, *T.S.*, vol. 152 (1934), pp. 139–40: "The sale in Estonia of herrings, salted or cured in the United Kingdom and exported therefrom, shall . . . take place under conditions of free and fair competition with other herrings whether caught by Estonian vessels or salted or cured in Estonia, or imported salted and cured from other sources, and such other herrings shall not be placed in any more favourable position by subsidies in any other manner than herrings salted or cured in the United Kingdom and exported therefrom".

[2] See, *e.g.*, the Treaties with Japan of 14 Oct., 1854, Art. 5 (*Hertslet*, vol. IX, p. 978) and with Siam of 23 Nov., 1937, Art. 13 (2) (*L.o.N.*, *T.S.*, 188 (1938), p. 344).

[3] See, *e.g.*, the Treaty with the United States of America of 28 March, 1935, Art. 4 (II) (*ibid.*, vol. 162 (1935), p. 42).

[4] See McNair, *loc. cit.*, pp. 13 *et seq.*

[5] Series B 15, pp. 17–18. Such an interpretation, however, has certainly not recommended itself to either the Courts of France or of the United States in their interpretation of m.f.n. obligations. See *Chenoward* v. *Denis* (1926) (Clunet, 1927, p. 420) or *George E. Warren* v. *United States* (1938), 94 F. (2d) 597, in which the Court refers with approval to *Taylor* v. *Morton* (1855), 2 Curtis 454: "The truth is that this clause in the treaty is merely a contract, addressing itself to the legislative power. . . . The contract is to legislate in conformity with a rule therein given. This necessarily addresses itself, exclusively, to the legislative power. It is a rule of their action, and not of the action of courts of justice".

[6] Cf. the present writer's "The Three Types of Law", *Ethics*, vol. 53 (1943), pp. 89 *et seq.*, and "International Law and Society", *Virginia Quarterly Review*, vol. 20 (1944), pp. 577 *et seq.*

[7] On the practice of the United States of America, see *loc. cit.* in note 10, p. 101; on the practice of the U.S.S.R. see *loc. cit.* in note 1, p. 98; on the practice of Germany, see the literature quoted in Held, *loc. cit.* in note 3, p. 97; and on the practice of France, see S. Basdevant, "*Clause de la Nation la plus Favorisée*", in A. de Lapradelle et J. B. Niboyet, *Répertoire du Droit International*, Paris, 1929, vol. III ,pp. 483 *et seq.*

(*a*) *Personal Scope.* With regard to individuals, there has been a tendency to extend the operation of the m.f.n. standard not only to "all the subjects of His Majesty", but also to "all persons under His Majesty's protection", including foreigners "ordinarily resident" in the parts of the British Empire to which the treaty applies. British companies are defined as including "all limited liability and other companies, partnerships and associations formed for the purpose of commerce, finance, industry, transport or any other business". They must be either constituted in accordance with the laws in force in the United Kingdom or in those other parts of the British Empire to which the treaty applies or ordinarily there carry on their business.[1] Accordingly, the United Kingdom has refused to comply with requests to "agree to any stipulations which would have the effect of placing Her Majesty's subjects of any particular religious belief in a less advantageous position than others of Her Majesty's subjects in regard to their treatment in foreign countries",[2] or to consent to any other kind of discrimination between British subjects. The nationality of British vessels is either left to be determined in accordance with British municipal law, or it is expressly provided that they must be registered in a port within the British Commonwealth of Nations.[3] In the case of aircraft, the registration principle applies.[4] Goods, from whatever place arriving, are considered to be British if they are the growth, produce or manufacture of the United Kingdom or of any other part of the British Empire covered by the treaty.[5]

(*b*) *Territorial Scope.* In accordance with a practice of long standing,[6] commercial treaties concluded by the United Kingdom do not automatically extend to any other parts of the British Empire. Usually, the United Kingdom reserves the right to extend on notice and on a basis of reciprocity such treaties to any of His Majesty's colonies, overseas territories, protectorates or mandates in respect of which the mandate is exercised by the Government in the United Kingdom. Equally, the United Kingdom reserves to itself as a rule the right of accession to the treaty by notification

[1] For recent instances see the Treaty of the United Kingdom and India with Yemen of 11 Feb., 1934, Art. 5 (*L.o.N., T.S.*, vol. 157 (1935), p. 65), and the Treaties of the United Kingdom with Brazil of 27 March, 1935, Art. 12b (*ibid.*, vol. 160 (1935), p. 316), and with Siam of 23 Nov., 1937, Protocol (*L.o.N., T.S.*, vol. 185 (1938), p. 352). For an exceptional formulation of the criterion of the nationality of British companies, see the Treaty with Poland of 26 Nov., 1923, Art. 7 (*ibid.*, vol. 28 (1924), p. 435): "Associations and companies established for the development of the petroleum industry and regarded by the two contracting parties as of British nationality shall enjoy in Poland all the rights and privileges which may be accorded to such associations and companies of any third Power".

[2] Note of the Earl of Derby of 23 Nov., 1876 to Prince Ghika (Rumania) (Parl. Pap. 1877. LXXXIX. 5 (C. 1765), No. 90, p. 46). Cf. also the Treaty with Morocco of 9 Dec., 1856, Arts. 13 and 16 (*Hertslet*, vol. X, p. 908). See, by way of contrast, the Treaty between the Union of South Africa and Germany of 1 Sept., 1928, Art. 25 (*L.o.N., T.S.*, vol. 95 (1929), p. 302)

[3] Cf. the Treaties with Yugoslavia of 12 May, 1927, Art. 22 (*ibid.*, vol. 81 (1928), p. 179), with Yemen (*loc. cit.* in note 1 above, p. 65), and with Siam (*ibid.*, p. 352). Cf., however, the Treaty with the U.S.S.R. of 16 Feb. 1934, Art. 6 (*ibid.*, vol. 149 (1934), p. 454).

[4] Cf. the Treaty with the U.S.A. of 28 March, 1935, Art. 2, paragraph 2 (*ibid.*, vol. 162 (1935), p. 48). See also the Treaty with Greece of 30 May, 1939, Art. 1 (IV), (*ibid.*, vol. 202 (1940), p. 10).

[5] See the Treaty with the United States of America of 17 Nov., 1938, Art. 2 (*ibid.*, vol. 200 (1940–1), p. 296). On the question of the "naturalization" of goods and of "important transformation" of such goods in another country, cf. *L.o.N.*, 1933, II, B.1, pp. 16–18.

[6] See the Instruction by Lord Salisbury to the British Minister at Brussels of 28 July, 1897 (Parl. Pap. 1877, LXXXVIII (C. 8442, No. 2, p. 1), p. 83) and, e.g., the Treaty with Rumania of 31 Oct., 1905, Art. 17 (Commercial No. 3 (1907), p. 45).

on behalf of any Member of the British Commonwealth of Nations, whose Government may desire that such accession should be effected, including dependencies and mandates of such Dominions. In addition, it is generally stipulated in their favour that as long as such territories grant *de facto* m.f.n. treatment to the other contracting party they are to enjoy corresponding treatment.[1]

(*c*) *Scope ratione temporis.* The controversy in the literature on the scope of m.f.n. treatment in this respect is not of much practical significance with regard to British treaties. From an early date onwards, it is expressly provided in the treaties concluded by this country that m.f.n. treatment does not merely extend to favours already granted to third States by the other contracting party but also to those that "shall be hereafter granted to any other prince or people".[2] This formulation equally serves the purpose of clarifying that it is the *grant* of the privilege to a third State and not the actual *claim* of the privilege by the third State under its treaty with the promisor which brings the standard into operation.[3]

(*d*) *Functional Scope.* Though it would be tempting to elaborate in detail the functional scope of the m.f.n. standard as applied in British State practice, limitations of space permit merely to give the barest indication of its field. Compared with the clauses of earlier treaties, the scope of m.f.n. treatment is more concretely defined in modern treaties. In matters affecting import and export trade, the reign of the standard is undisputed. It shares its popularity with the standard of national treatment[4] in matters related to navigation, fisheries, land and air transport, and regarding the personal and proprietary rights of foreigners. It is also widely applied in order to define the status of consular officers. Occasionally even the status of diplomats, missionaries, and men-of-war is settled on this footing. Some of the older treaties provide clauses of real rarity value: the payment of slave-charges of liberated British subjects and the punishment of British subjects on a m.f.n. basis.[5] For practical purposes it is essential to bear in mind the exact scope of each particular m.f.n. clause; for m.f.n. treatment can only be claimed with respect to favours *ejusdem generis* granted by the promisor to third States.[6]

[1] Cf. the Treaties with Siam, Arts. 22–5 (*loc. cit.* in note 1 above, p. 107), pp. 348–50) and with Muscat of 5 Feb., 1939, Arts. 1, 19 and 20 (*ibid.*, vol. 196 (1939), pp. 304–5 and 310).

[2] Treaty with Portugal of 29 Jan., 1642, Art. 15 (*Hertslet*, II, pp. 6–7). For a recent instance, see Art. 2 of the Treaty with the United States of America (*loc. cit.* above in note 4, p. 107).

[3] Cf. the Report by the King's Advocate of 12 Sept., 1834, McNair, *loc. cit.*, pp. 291–2.

[4] See below under VIII, pp. 118 *et seq.*

[5] Cf., *e.g.*, the Treaty with Algiers of 10 April, 1682, Arts. 12 and 16 (*Hertslet*, I, pp. 61–3).

[6] For an interesting application of this principle, see the decision of the Umpire of the British-Venezuelan Mixed Claims Commission in the case of the *Aroa Mines* under the Protocol of 13 Feb., 1903. It was held that the relevant m.f.n. clause on which Great Britain relied and which extended to the administration of justice only applied to rights before national courts, but not, as Great Britain had maintained, to the proceedings of the international Mixed Commission (Ralston, *Venezuelan Arbitrations of* 1903, Washington, 1904, pp. 344 *et seq.*). The question whether rolled and hammered iron are to be considered as "like articles" forms the subject of a prolonged correspondence between Great Britain and the United States of America in the years between 1816 and 1821. Cf. especially Mr. Stratford Canning's Note of 26 Nov., 1821, to the United States Secretary of State, the Hon. J. Q. Adams (9 Br. and For. St. Pap. (1821–2), pp. 641 *et seq.*, at pp. 648–9). On the controversy between France and the United Kingdom regarding the latter's right to claim the benefits of Art. 13 of the Franco-Italian Consular Convention of 28 Sept., 1896 (23 Martens *N.R.*, 2nd series, p. 363), see the

V. *Exceptions*

In British State practice, exceptions to the operation of the m.f.n. standard are stipulated in the interest of preferential treatment and on grounds of national or international public policy.

(*a*) *Exceptions in Favour of Preferential Treatment.* In an inter-State system composed of more than three States, the standards of m.f.n. and preferential treatment are mutually exclusive. While the unity between mother country and colonies cannot be challenged by another State,[1] the position is different if a composite State such as the British Empire and Commonwealth consists of a number of entities with distinct international personalities of their own, as in the case of the Dominions, international Protectorates or the A-Mandates.[2] In order to make possible preferential treatment between the members of this family of nations, the commercial treaties of the United Kingdom—particularly since the Imperial Economic Conference of Ottawa of 1932[3]—either contain an express reservation allowing for such preferential treatment, or the same object is achieved by limiting m.f.n. treatment to that of any other *foreign* country and by defining at the same time a foreign country in relation to the United Kingdom as "any country or territory not under the sovereignty, protection, suzerainty or mandate of His Majesty."[4] Equally, the United Kingdom has frequently conceded corresponding exceptions to other States in the interest of frontier traffic, neighbouring States, customs unions, protectorates and regional collaboration.[5]

[*Note continued from previous page.*]
Advisory Opinion of the Permanent Court of International Justice on the *Nationality Decrees in Tunis and Morocco* (1923), B 4, p. 31. Cf. also the Note of Earl Granville to M. Challemel-Lacour of 20 May, 1881 (Permanent Court of International Justice, C2, p. 531).

[1] See the Report by the Law Officers of the Crown of 14 Jan., 1882, McNair, *loc. cit.*, p. 298, and Lord Lansdowne's Despatch to Sir E. Monson of 13 Jan., 1903 (Parl. Papers 1903, LXXV (Cd. 1470), No. 1, p. 1 (p. 579): "The attitude of His Majesty's Government in regard to the matter has never varied. They have declined altogether to agree that Great Britain should be under any obligation to treat the British Colonies as foreign countries".

[2] Under the mandate treaties and treaties with the United States of America, the United Kingdom is under an obligation to apply in A- and B-Mandates the standard of equality of opportunity. See below under VIII, pp. 118–119.

[3] Cf. Parl. Papers, 1931–2, X (Cmd. 4174, pp. 10–11), pp. 710–11.

[4] Cf. the Treaties with the U.S.S.R., Art 7 (*loc. cit.* above in note 3 (p. 101), p. 454, and with the United States of America, Art. 21, and Exchange of Notes (*loc. cit.* in note 5 (p. 101) above, pp. 306 and 470).

[5] Chief amongst them are those covered by the so-called Austrian Empire, Baltic, Central American, Iberian, Scandinavian and Ottoman Empire clauses. See, however, the adverse Report of the Committee on Commercial Relations with Foreign Countries, which was approved by the Ottawa Conference, on preferential agreements on a regional basis between foreign countries, *loc. cit.* in note 3 above, pp. 821–2 (Cmd. 4174, pp. 25–6). In the absence of an express reservation, a State can demand under the m.f.n. standard the benefits of exclusive preferential treaties, bilateral or multilateral, between the promisor and third States, such as customs unions which leave the international personalities of the contracting States intact. Yet if the convention is an open one, there is much to be said for the view that the beneficiary should not claim the benefits of such a convention without sharing the burdens connected with it, or at least that it should claim the fulfilment of m.f.n. obligations only in so far as it accords itself in fact to the other State the benefits which it claims. Cf. the Convention regarding the Immunity of State-Owned Vessels of 10 April, 1926, Arts. 6 and 10 (*L.o.N.*, *T.S.*, vol. 176 (1937), p. 209); the Agreement between the United States of America, the Economic Union of Belgium and Luxemburg, Colombia, &c., of 15 July, 1934 (*ibid.*, 165 (1936), p. 10), and the letter of Secretary Hull to President Roosevelt of 10 May, 1935 (*Hackworth, loc. cit.*, vol. V, p. 93).

(*b*) *Exceptions on Grounds of National Public Policy* cover import and export restrictions and prohibitions imposed for the protection of public health, on moral or humanitarian grounds, or for the protection of animals and plants; they may relate to the importation and exportation of silver and gold or to the export of national treasures of artistic, historic or archæological value; or they become necessary for reasons of public security, owing to a state of war or because of the international obligations of one of the contracting parties as a neutral power.[1]

The question whether all or some of these reservations are legitimate even if not expressly stipulated is part of the wider issue of the proper interpretation of commercial treaties and cannot be answered within the compass of this paper.[2] Yet even in the case of the application of such prohibitions and restrictions there is still scope for the operation of the m.f.n. standard. The imposition of such protective measures is incompatible with the standard if it does not extend to other countries in regard to which like grounds for applying such measures exist, or if such measures constitute trade restrictions in disguise.[3]

(*c*) *Exceptions on Grounds of International Public Policy.* In the more recent commercial treaties of the United Kingdom there is a standard clause to the effect that "this treaty shall not be deemed to confer any right or to impose any obligation in contravention of any general international convention to which either of the contracting parties are or hereafter may be parties". Or, more narrowly, import and export prohibitions are authorized if imposed by either contracting party in pursuance of obligations under international agreements in force on the day of the signature of the treaty in question.[4] Such reservations cover some, if not all, of the issues which may arise from the obligations of States under a collective agreement which provides for the application of economic and financial sanctions. During the Italo-Ethiopian War, the problem arose with regard to the application of sanctions under Article 16 of the Covenant of the League of Nations. It appears that at least two aspects of the matter require separate discussion:

In the first instance, in spite of m.f.n. obligations towards the aggressor, members are bound and entitled to apply sanctions against such a State, at least if the aggressor is a member of the collective system or has otherwise recognized the legitimacy of sanctions.[5] This follows from the aggressor's submission to the *lex societatis*. Such consent given in advance deprives the

[1] Cf. the Treaties with Portugal of 11 May 1938, Art. 6 (*L.o.N., T.S.*, vol. 191 (1938), p.290) and with the United States of America, Arts. 4 and 16 (*loc. cit.* in note 4 (p. 107) above, pp. 296 and 304).

[2] See the Report by the Queen's Advocate of 28 July, 1845 (McNair, *loc. cit.*, p. 236), the Report by the Law Officers of the Crown of 18 March, 1867 (*ibid.*, p. 241), the Dissenting Opinions of Judge Anzilotti and Judge Huber in the *Wimbledon* case, Permanent Court of International Justice, A 1, pp. 36–7, and A. T. Klets, "Neutrality Laws and Exceptions to Commercial Treaties", *Proc. Am. Soc. Int. Law*, Washington, 1936, pp. 141–2.

[3] See pp. 112 *et seq.* below under VI.

[4] Cf. the Treaty with Austria of 22 May, 1924, Art. 22 (*L.o.N., T.S.*, vol. 35 (1926), p. 188). Other Treaties specifically refer to multilateral treaties such as the International Opium Convention of 1925 or the Convention on Narcotic Drugs of 13 July, 1931.

[5] Cf. the present writer's *The League of Nations and World Order*, London, 1936, pp. 105 *et seq.*, and *Modern Law Review*, 3 (1939), p. 152.

aggressor of any claim against the sanctionist States, based on the alleged violation of m.f.n. treatment, and of any right to retaliation.[1]

Secondly, if, in accordance with Article 16, paragraph 3, of the League Covenant or under corresponding clauses of other international agreements, sanctionist States grant special concessions to those amongst them who have suffered special losses from the application of sanctions, third States cannot claim under the m.f.n. standard to be entitled to the same benefits. In the case of members of the collective system, such a claim would be contrary to the spirit of their collective obligations.[2] When such a request was actually made by Hungary to the Government of the United Kingdom, it met appropriately with a refusal.[3] In the case of non-members, the same result follows from the general rules applying to the interpretation of commercial treaties which do not contemplate "economic relations of so exceptional a nature as those which are here under consideration".[4]

Exceptions of any kind hamper the automatic operation of the m.f.n. standard and are a possible cause of friction and dispute. In the absence of expresss stipulations in the treaties in question, there is no presumption which can be applied automatically to all three categories of exceptions. It is, however, believed that the following presents an accurate summary of the position:

(1) There is no presumption in favour of exceptions on grounds of preferential treatment.

(2) Presumptions in favour of exceptions on grounds of national public policy can generally be derived from the context in which m.f.n. treatment has been arranged as, for instance, in the case of conventions in the spheres of commerce and communications.

(3) There is a presumption in favour of the overriding character of exceptions on grounds of international public policy.

[1] This is expressly provided in Art. 44 of the Agreement concerning the Regulation of Production and Marketing of Sugar of 6 May, 1937 (I.L.O., *Intergovernmental Commodity Control Agreements*, Montreal, 1943, p. 41).

The special difficulty raised by Austria that, under Art. 284 of the Peace Treaty of St. Germain, she was equally bound to grant freedom of transit for goods coming from or going to Italy, is merely imaginary. Like other obligations of a commercial character, they are suspended in emergencies such as war and aggression (see above, note 2 (p. 110), if incompatible with the *lex specialis* applying in such cases. (See the Report of the Legal Sub-Committee of the Co-ordination Committee of the League of Nations, *O.J.*, Spec. Suppl. 145, p. 21).

[2] See L.o.N., Spec. Suppl. 145, p. 26.

[3] Hungary asked the United Kingdom to accord to imports of Hungarian poultry the same customs concessions as had been granted to imports from Yugoslavia as a compensation for losses incurred by the operation of sanctions against Italy. The claim was rejected, as the concessions to Yugoslavia had been made "in virtue of a decision of the League of Nations of which Hungary was also a member and the decisions of which Hungary was also obliged to carry out" (*The Times*, 9 Jan., 1936, p. 9 (d)).

[4] *Loc. cit.* in note 2 above, p. 26. See also Arts. 5, 11 and 12 of the International Convention for the Abolition of Import and Export Prohibitions and Restrictions of 8 Nov. 1927, Handbook, *loc. cit.* in note 8 (p. 101) above, pp. 971 and 973–4, note 2 (p. 110) above, and, on the wider issues involved, Ch. Rousseau, "*De la Compatibilité des Normes Juridiques Contradictoires dans l'Ordre International*", *Rev. Gén. Dr. Int. Public*, 39 (1932), pp. 133 *et seq.*, and H. Lauterpacht, "The Covenant as the 'Higher Law'", this *Year Book*, 17 (1936), pp. 54 *et seq.*

VI. *The Most-Favoured-Nation Standard and the Growth of Collective Planning*

As in the spheres of the law of neutrality and of State immunity, the growth of collective economy and planning has brought about a shift of emphasis from traditional to apparently novel aspects of basic international conceptions, without leading to a "breakdown" of international law.[1] The same phenomenon may be observed in the sphere of international economic law in general and with regard to the m.f.n. standard in particular. In order to arrive at a proper assessment of the impact of that transformation of national and international affairs on the m.f.n. standard, it should be remembered that the non-commercial spheres in which the standard has continued to be applied as hitherto, have not at all been affected by these changes.[2] Furthermore, in the interval between the two world wars, these changes have not been the only ones that are significant from our point of view. The principle of the free convertibility of currencies in the international market has not remained sacrosanct. Neither has it been possible any longer to take the stability of currencies for granted. Finally, during that period, a number of countries had forged their national economies into at least potential mechanisms for commercial warfare.[3]

In the field of international economic relations, the disintegration and transformation of world trade has exercised a fourfold effect on the operation of the m.f.n. standard. This process has affected the automatic operation of the standard, its functions, its scope and its durability.

(*a*) *Effect on the Automatic Character of the Standard.* In the cases of quantitative limitations of imports or of a managed currency, the chief problem for foreign merchants consists in receiving a fair allocation of the available licences, quotas or currency. While the absence of any international understanding on matters of this kind produces accidental discrimination or administrative favouritism, absolute equality may be highly unfair to States which, in the past, have been the chief-suppliers of the country in question, and for which the continuation of such exports may be of vital importance. In such cases the principle of equitable treatment on a basis of non-discrimination makes it possible to take such circumstances into account and creates a state of proportionate equality between the importing countries on the basis of the m.f.n. standard.[4] Yet if such pro-

[1] See W. Friedmann, *The Growth of State Control over the Individual and its Effect upon the Rules of International Responsibility*, this Year Book, 19 (1938), pp. 118 *et seq.*, and *loc. cit.* in note 2, p. 104 above, 1943, pp. 42 *et seq.*

[2] Cf. the Report of the F.B.I. International Trade Policy Committee on *International Trade Policy*, London, 1944, No. 41 (p. 18). See, however, Empire Economic Union, *Post-War Economic Policy*, London, 1945, pp. 20 *et seq.* A balanced review of this Memorandum will be found in the leading article on "The Most Favoured Nation" in *The Times* of 29 Jan., 1945.

[3] Cf. E. Korovine, "*Les Pactes de Non-Agression Economique*", *The New Commonwealth Qvarterly*, vol. I (1935), pp. 203 *et seq.*; E. Staley, *World Economy in Transition*, New York 1939, pp. 127 *et seq.*; Economic Committee of the League of Nations, *The-Most-Favoured Nation Clause*, Geneva 1936 (1936, II, B.9); and L.o.N., *The Transition from War to Peace Economy*, Geneva, 1943, pp. 19 *et seq.*

[4] See the Treaties with Poland, Art. 7 (*loc. cit.* in note 1 (p. 107 above) p. 186), with Siam, Art. 8 (*ibid.*, p. 340), and with the United States of America, Art. 5 (*loc. cit.* in note 2 (p. 107 above) pp, 297–8), and the Despatches of Secretary Hull to Ambassador Dodd (Berlin) of 9 Oct. 1933, and of the Assistant Secretary of State (Moore) to the United States' Chargé d'Affaires *ad interim* to Estonia of 9 Sept., 1935 (*Hackworth. loc. cit.*, vol. V, pp. 277 and 286–7).

cedures are adopted, there is no longer room for the automatic operation of the standard, and internal planning is achieved at the price of international uncertainty and tiresome inter-State negotiations.

(*b*) *Effect on the Functions of the Standard.* Beyond the assurance of equitable treatment no favour can be bestowed in such circumstances on a foreign country other than the guarantee that allocations of licences, quotas and currency will be made "on conditions not less favourable than allocations to any other foreign country".[1] Thus, again, the m.f.n. standard has been reduced to the fulfilment of its minimum—and permanent—function, namely, the prevention of discrimination. This function of the standard acquires still further significance in the relations between capitalist and socialist States. It serves here as the only legal guarantee of equality of opportunity in trading with a State monopoly of foreign trade as it is practised by the U.S.S.R. Only in this way can the object be achieved that, "in considering any given transaction, regard shall be had to financial and commercial considerations only".[2]

(*c*) *Effect on the Scope of the Standard.* The scope of the m.f.n. standard as taken for granted in the era of free trade already became gradually restricted before the First World War by the limitation of production and the division of the world's markets by means of understandings between a growing number of international cartels, concerns and trusts.[3] In the interval between the two World Wars, this trend became more pronounced,[4] and governments took a more active part in such arrangements or even went to the length of concluding amongst themselves bilateral barter treaties, compensation agreements and multilateral commodity control conventions.[5] Thus, by means of private understandings between combines and of a considerable increase in inter-State planning, the scope of transactions between individual firms on the m.f.n. basis has been considerably narrowed in favour of agreed import and export restrictions.

The same trend was intensified by the growing interest taken by States in their home production and markets and the general atmosphere of economic nationalism pervading the post-1919 period.[6] Following the example set by France,[7] other countries, including the United Kingdom, began to split up the comprehensive m.f.n. clauses of the pre-1914 era

[1] Art. 7 of the Treaty with Poland (*loc. cit.* in note 1 (p. 107 above) p. 186).

[2] Treaty with the U.S.S.R. of 16 Feb., 1934, Art. 4 (*L.o.N., T.S.*, vol, 149 (1934), p. 450). See also the explanation of the function of the m.f.n. standard in commercial relations with the U.S.S.R. given by the President of the Board of Trade during the discussion of the Treaty in the House of Commons and the new problems arising out of trade with the U.S.S.R. which are not covered by "the old m.f.n. phraseology", (*Hans.*, vol. 286 (1933–4), col. 1290) and the Treaty with the United States, Art. 8 (*loc. cit.* in note 4 (p. 107 above) p. 298).

[3] Cf. R. Liefmann, *Cartels, Concerns and Trusts*, London, 1932, pp. 148 *et seq.* and pp. 265 *et seq.* On the attitude taken by this country in the early stages of the development towards monopolies, see Lord Lansdowne's Instructions of 12 Dec., 1901, to the British Delegates at the Brussels Sugar Conference (Parl. Pap. 1902, C IV. (Cd. 103, p. 18), No. 24, p. 312).

[4] Cf. R. A. Brady, *Business as a System of Power*, New York, 1943, pp. 237 *et seq.*, and J. Borkin and Ch. A. Welsh, *Germany's Master Plan*, London, 1943.

[5] See F. E. Lawley, *The Growth of Collective Economy*, London, 1938, vol. II, and *loc. cit* in note 1, p. 112 above.

[6] Cf. *loc. cit.* in note 1, p. 111 above, pp. 266 *et seq.*

[7] See F. A. Haight, *French Import Quotas. A New Instrument of Commercial Policy*, London 1935, pp. 2 *et seq.*

and to reformulate them in a more individualized and concrete manner.[1]

Furthermore, the number of the traditional exceptions to the m.f.n. standard has been increased by at least two newcomers: the anti-bounty and anti-dumping exceptions. From the end of the last century onwards, the issue was hotly debated whether the grant of export bounties by a State constituted an infraction of the m.f.n. standard or whether, on the contrary, countervailing duties[2], imposed in order to off-set such bounties, should be regarded as a violation of the m.f.n. principle. The former position was taken by Lord Salisbury and Lord Lansdowne in the controversy on the compatibility of Continental and, in particular, of Russian, sugar bounties with the m.f.n. standard. In their opinion, any such support granted to exporters amounted to an artificial disturbance of the balance of trade which could be legitimately redressed by corresponding anti-bounty duties.[3] While the arguments by which such export bounties were attacked in the British notes and pronouncements appear antiquated in an age in which *laissez-faire* economics have ceased to be the fashion of the day, there can be little doubt that if a State insists on granting export bounties, it is estopped from alleging the incompatibility of anti-bounty duties with the m.f.n. standard. Following, however, the example first set by Belgium, the commercial treaties of the United Kingdom now regularly contain an express reservation regarding countervailing duties.[4] Similarly, in accordance with the Safeguarding of Industries Act, 1921,[5] the United Kingdom now regularly reserves its freedom to apply special anti-dumping duties. Such dumping may consist in selling below cost price, more cheaply than in the country of production, or at lower prices than those obtaining in the British market (for instance, owing to the exploitation of foreign labour[6] or to the depreciation of foreign currencies[7]).

[1] See, e.g., Art. 15 of the Treaty with the United States of America (*loc. cit.* in note 4, p. 107 above, p. 302).

[2] As distinct from countervailing duties, there is much to be said for the view that contingent duties are incompatible with the m.f.n. standard. See *Bill* v. *United States* (1939), decided by the United States Court of Customs and Patent Appeals (*A.J.I.L.* 35 (1941), p. 160) and, on the different functions fulfilled by the two Customs duties, H. M. Catudal, "The Most-Favoured-Nation Clause and the Courts", *A.J.I.L.* 35 (1941), p. 45.

[3] See the *Correspondence relating to Sugar Bounties* (Parl. Pap. 1898, XCII (Cd. 8780), pp. 249–51); the instructions of Lord Salisbury of 31 May, 1898 to the British Delegates to the Brussels Sugar Conference (*ibid.*, (Cd. 8938—No. 2, p. 1), p. 283); the note of Lord Lansdowne of 20 Nov., 1902, to Baron Graevenitz (*ibid.*, 1903, LXXXV (Cd. 1401—No. 6, p. 19), p. 617). Cf. also W. P. B. Shepheard, "The Most-Favoured-Nation Article", *Journ. Soc. Comp. Leg.* N.S., vol. V (1903–4), p. 136, and W. Kaufmann, *Weltzuckerindustrie und Internationales und Koloniales Recht*, Berlin, 1904.

[4] See Art. 9 of the Treaty with the United States of America (*loc. cit.* in note 4, p. 107 above, pp. 298–300).

[5] 11 & 12 Geo. V, c. 47 (Part II, 2).

[6] A special exception usually affords protection against the importation of prison-made goods. See the Treaties with Portugal of 11 Sept., 1928, Art. 52 (6), (Handbook, *loc. cit.* in note 8 (p. 101) above, p. 567) and with the United States of America, Art. 16 (*loc. cit.* in note 3 (p. 107) above, pp. 298–300).

On a British proposal for the international regulation of the sale of prison-made goods, see the Despatch of Lord Salisbury of 19 July, 1895, to Her Majesty's Representatives at Paris (Martens, *N.R.G.*, 2nd series, vol. 27, pp. 425–7). Cf. also the Foreign Prison-Made Goods Act (60 & 61 Vict., c. 63).

[7] See the Treaty with the United States of America, Arts. 9 and 18 (*loc. cit.* in note 4, p. 107 above, pp. 298–300 and 304), J. Viner, *Dumping: A Problem in International Trade*, Chicago, 1923, and Sir William Beveridge and others, *Tariffs: The Case Examined*, London, 1931, pp. 125 *et seq.*

(*d*) *Effect on the Durability of the Standard.* Generally speaking, the increase in State planning, coupled with the instability of the post-1919 period, has had the effect of making the operation of the m.f.n. standard much more elastic than was customary in the period between 1815 and 1914, and it has subjected the standard to the continuous risk of being terminated on the shortest notice. Various devices have been adopted in order to achieve the object of greater elasticity:

(1) In the absence of a clause regarding their termination, the commercial treaties of the preceding period were considered to be of perpetual duration[1] or, at least, were concluded regularly for the period of a decade. More recent commercial treaties are either provisional agreements which are renewed from time to time or are concluded for relatively short periods of one or, at the most, of several years.

(2) Sections of commercial agreements which are of a particularly fluctuating character, such as those relating to the fixing of quotas, are subject to revision at intervals of a few months. If one of the contracting parties proposes to introduce substantial alterations in the allotment of quotas, negotiations have to take place. In the absence of agreement within a very short period, usually one month, the party which wishes to make the changes, is free to do so, but the other party may terminate the agreement in its entirety.[2]

(3) A number of other clauses, designed to maintain an equilibrium which, at the time of the conclusion of the treaty, had been taken for granted by both sides, and to ensure the effectiveness of the agreement, have introduced the principle of the *clausula rebus sic stantibus* into recent commercial treaties. Such clauses may specifically refer to the state of the currencies of the contracting parties at the time of the conclusion of the treaty, the then existing balance of trade, the amount of exports of coal from the United Kingdom to the other contracting party, the then obtaining level of customs duties, or, more generally, they may cover any measures "which, while not conflicting with the terms of this Agreement, appear to the other High Contracting Party to have the effect of nullifying or impairing any of the objects of the Agreement."[3] If any of these contingencies should arise, the other contracting party may demand the opening of negotiations for a mutually satisfactory adjustment of the issue or, in the absence of such a settlement, may terminate part or the whole of the treaty.

(4) Finally, numerous commercial treaties of the United Kingdom, commencing with the Treaty concluded with Portugal in 1810,[4] contain general revision clauses which in periods of transformation and dislocation of international trade have acquired a significance incomparably greater than they had in the nineteenth century or in the pre-1914 period.

In order to grasp the present significance of the possibility of the speedy revision and termination of commercial treaties, it is necessary to recall the

[1] See Lord Palmerston's view to this effect regarding the Treaty of Commerce and Navigation with Colombia of 18 April, 1825, confirmed by the Treaty with Venezuela of 29 Oct., 1934 (Br. and For. St. Pap. 77 (1885–6), p. 773. Cf., however, McNair, *loc. cit.*, pp. 365–8.

[2] See Art. 15 (3) of the Treaty with the United States of America (*loc. cit.* in note 4, p. 107 above, p. 302).

[3] *Ibid.*, Art. 20 (*loc. cit.*, p. 304).

[4] Art. 33 (*Hertslet*, vol. II, pp. 63–4).

change in the functions of the m.f.n. standard which has been brought about by the increase in State planning. In the spheres affected by this development, the main purpose of the standard now consists in achieving a state of proportionate equality between States. As long as such an equilibrium is not disturbed by hasty or unwarranted changes in national policy, there is no need for new negotiations or the termination of the agreement. Should reasons of considerable weight call for such a step, a contracting party may do so at the peril of finding itself deprived of the advantages which it had itself derived from the treaty. Thus the devices by which these weapons are put in the hands of the other party actually serve the purpose of strengthening the stability of a laboriously achieved equilibrium. Somewhat paradoxically, the manifold provisions for the revision and termination of commercial treaties have a tendency to assure the continuity of their operation.

VII. *Circumvention and Infraction of the Most-Favoured-Nation Standard*

In the realm of tariffs, circumventions and infractions of the m.f.n. standard require a minimum of ingenuity. Customs regulations and procedure, methods of verification and analysis, conditions of payment of duties, tariff classification and interpretation, drawbacks and rebates offer golden opportunities to what is euphemistically called administrative protectionism and what should more properly be described as the evasion of m.f.n. obligations.[1] The attack against the effective operation of the m.f.n. standard may also come from unscrupulous third parties who may make use of false indications of origin in order that their products might participate in the advantages agreed between parties to m.f.n. agreements.

Measures of protection against such abuses and false indications of origin have been taken by means of collective and bilateral treaties. Some of the commercial treaties of the United Kingdom contain a clause reiterating Article 7 of the International Convention relating to the Simplification of Customs Formalities of 3 November 1923: "The contracting States undertake to take the most appropriate measures by their national legislation and administration, both to prevent the arbitrary or unjust application of their laws and regulations with regard to customs and other similar measures, and to ensure redress by administrative, judicial or arbitral procedure for those who may have been prejudiced by such abuses."[2] Or, in accordance with the International Agreement for the Prevention of False Indications of Origin on Goods of 6 November 1925, parties to the Agreement are bound to seize such goods.[3] Additional engagements providing for the publicity of tariffs and for certificates of origin further serve the purpose of safeguarding the operation of the m.f.n. standard. Yet ultimately the standard owes its protection to the principle of reciprocity, which forms the basis and the most effective sanction in these spheres of international law, rather than

[1] For recent instances of such practices see J. M. Jones, *Tariff Retaliation*, Philadelphia, 1934, pp. 282–7. Cf. also Art. 265 of the Peace Treaty of Versailles of 1919 and O. Paranaguá, *Tariff Policy*, London, 1935, pp. 81 *et seq.*

[2] Handbook, *loc. cit.* in note 8 (p. 101)above, p. 899.

[3] *Ibid.*, p. 963.

to any treaty clause. States which apply m.f.n. treatment restrictively or attempt to evade their obligations must expect retaliation. Accordingly, a liberal interpretation of the duties under the standard is likely to repay better than a narrow construction motivated by considerations of short-term advantages. Some of the treaties concluded by this country expressly lay down rules for their liberal interpretation. Yet none of them has surpassed in simplicity and wisdom Article 41 of the General Convention with Tunis of 19 July 1875: "If any doubt should arise with regard to the interpretation or the application of any of the stipulations of the present Convention, it is agreed that in Tunis the interpretation the most favourable to British subjects shall be given and in Her Majesty's dominions that most favourable to Tunisians."[1] If contracting States bear this injunction in mind, none of the issues which may arise between them are incapable of being solved by a reasonable interpretation founded on the application of uniform and objective tests.[2]

Though there are frequent instances of diplomatic controversies on the interpretation and application of m.f.n. clauses, there are only few instances of international adjudication on the subject of m.f.n. treatment.

Under the Convention of 1853, the Mixed Claims Commission between Great Britain and the United States had to deal with three cases calling for the interpretation of m.f.n. clauses.[3] In spite of some arbitration clauses on the model of the Protocol between Great Britain and Italy of 15 June 1883,[4] it cannot be said that, in the pre-1914 period, this country had automatically accepted the principle of arbitration in matters involving the interpretation and application of m.f.n. obligations. Thus, in the dispute with Russia over the Sugar Bounties,[5] the British Government did not consider the case "one proper to be submitted to the judgment of an Arbitral Tribunal".[6] In the post-1919 years, both under collective[7] and bilateral[8] treaties, the United Kingdom has readily undertaken to submit such disputes, in the absence of a settlement by diplomatic means, to the jurisdiction of the Permanent Court of International Justice or of the Permanent Court of Arbitration.

[1] *Hertslet*, vol. 14, p. 554.

[2] The rules of interpretation laid down in the Anglo-French Treaty of Commerce of 1606 still deserve attention: "*Conventum ulterius et concordatum est, quod hic Tractatus illum Sensum et Intellectum habeat quem ipsorum verborum Proprietas et Vis per se fert, nullamque hujusmodi Interpretationen admittet quae vim eijus formam et effectum, verbis appertis et simplicibus expressum, ulla in parte impedire queat, sed omni subtili Disquisitione sublata (quae Concordiae Contrahentium intellectum subvertere solet) quod bona fide hoc Tractatu agitur atque exprimitur, id etiam integre et sincere praestetur et observetur.*" *Rymer*, vol. XVI, p. 650. Cf. also the Despatch of Earl Granville to Colonel Mansfield of 21 Nov. 1882 (Br. and For. St. Pap. 77 (1885–6), pp. 778–9.

[3] Moore, *International Arbitrations*, vol. IV, pp. 3361–4. The case which was decided did not involve any point of general significance and, in the other two cases, the claims were withdrawn after a satisfactory settlement.

[4] *Hertslet*, vol. 15, p. 776.

[5] Cf. above, p. 144.

[6] Parl. Pap. 1903. LXXV (Cd. 1401—No. 6, p. 20), p. 618.

[7] Art. 13, Para. 2 of the Covenant; Art. 36 of the Statute of the Permanent Court of International Justice; General Act of 1928, Art. 17; and the Convention on Simplification of Customs Formalities of 1923, Art. 22 (*loc. cit.* in note 2, p. 116 above, p. 908).

[8] Cf. Art. 14 of the Treaty with Poland of 27 Feb. 1935 (*L.o.N., T.S.*, vol. 162 (1935), pp. 189–92). Frequently, it is also provided that the Court can deal with such questions by means of summary procedure under Art. 29 of the Statute of the Permanent Court of International Justice.

VIII. *The Most-Favoured-Nation Standard in relation to the other Standards of International Economic Law*

It remains to discuss the m.f.n. standard in relation to the other standards of international economic law.

(*a*) *The Minimum Standards of International Law.* In numerous bilateral treaties in the conclusion of which, from an early date, Great Britain has taken a leading part, and in the practice of Mixed Claims Commissions as well as of the Permanent Court of International Justice, principles have been elaborated which correspond to the minimum requirements of civilized communities regarding the treatment of individuals, and their personal and property rights. As compared with the m.f.n. standard, they are overriding in the sense that no State may infringe them and plead the excuse that it is treating the subjects of other States equally badly. Just as there are circumstances in which, in order to comply with the minimum standards of civilization, a State may have to treat foreigners better than its own nationals,[1] so every State can insist on a treatment of its subjects commensurate with the requirements of the minimum standards of international law, whether or not other States rest content with any other treatment of their own nationals.

Another aspect of the interaction between the two standards which deserves to be emphasized is that it has been the function of the m.f.n. standard to generalize the minimum standards of international law as formulated in bilateral treaties, particularly in those concluded with South and Central American States and some Oriental countries.

(*b*) *The Standard of Preferential Treatment.* If the international system consisted only of three States, it is perfectly conceivable that the promisor should grant to the beneficiary of m.f.n. treatment preferential treatment as compared with the State constituting the *tertium comparationis*. Yet in a world-wide system of inter-related m.f.n. treaties, the standards of m.f.n. and preferential treatment are mutually exclusive, and the one can be extended only at the other's expense.

(*c*) *The Standard of Reciprocal Treatment.* The reciprocity standard requires mutually identical treatment of the contracting parties, whereas the m.f.n. standard aims at the absence of discrimination. The principle of reciprocity finds its legitimate application to the m.f.n. standard in the bilateral grant of m.f.n. treatment. To attempt more, as has been done in construing the m.f.n. clause conditionally, means to achieve less or, at least, to sacrifice the automatic character of the m.f.n. standard to dubious gains in favour of the reciprocity standard.

(*d*) *The Standard of Equitable Treatment* may require discrimination in order to serve its purpose and may thus conflict with the m.f.n. standard. Yet in cases in which the object of equitable treatment is merely the avoidance of "excessive, unnecessary or arbitrary" measures,[2] the functions of

[1] Cf. the Judgments of the Permanent Court of International Justice in the cases of *German Interests in Polish Upper Silesia* (1926), A 7, pp. 32–3, and of the *Peter Pázmány University* (1933), A/B 61, p. 243.

[2] Art. 1 of the International Convention on the Simplification of Customs Formalities of 3 Nov., 1923 (Handbook, *loc. cit.* in note 8 (p. 101) above, p. 897).

the two standards may coincide in practice or beneficially supplement each other. Moreover, in the spheres affected by the increase in State planning, the standard of equitable treatment becomes the only denominator on which m.f.n. treatment can still be achieved and creates the possibility of an at least proportionate equality between beneficiaries of the m.f.n. standard.

(*e*) *The Standard of the Open Door.* This standard aims at the same object as the m.f.n. standard: equality of opportunity for foreign States. Yet there is one essential difference between the two standards. In the case of the open door, the *tertium comparationis* is not primarily, or not only, third States, but any of the contracting parties. Thus, in contrast to the m.f.n. standard, any preferential treatment granted to any of the beneficiaries by the promisor is incompatible with this standard.

(*f*) *The Standard of National Treatment.* Under this standard, the nationals of the promisor form the *tertium comparationis.* Whereas the m.f.n. standard aims at foreign parity, the object of the national standard is inland parity. The following generalizations from British State practice may not unfairly summarize the relations between the two standards:

(1) There are aspects of customs duties on imports and exports where national treatment would be meaningless,[1] and where, therefore, the national standard has no opportunity of competing with the m.f.n. standard.

(2) There are other spheres such as the personal and property rights of foreigners, free access of foreigners to the courts, or equality with nationals in taxation or navigation, where the national standard enables foreigners to enjoy rights not accessible to them under the m.f.n. standard. In these fields, national treatment means more than m.f.n. treatment, and the latter must be considered to be implied in the former.[2] Frequently both national and m.f.n. treatment are stipulated regarding the same topic, and, in case of doubt, this means that these privileges are granted as cumulative—and not merely as alternative—rights.[3]

(3) As with regard to the minimum standards of international law so with regard to the national standard, the m.f.n. standard fulfils the function of generalizing the privileges granted under the national standard to any third State amongst the beneficiaries of m.f.n. treatment in the same field.

Summary

The conclusions reached in this paper may be shortly summarized as follows:

(1) The m.f.n. standard is one of the basic standards of international economic law.

(2) The essential features of the m.f.n. standard are that it is incompatible with discrimination against the beneficiary, that it does not exclude dis-

[1] This point is well put by W. McClure: "There would be no such thing as national treatment in customs because national produce is not imported and so does not come into contact with the customs house, and foreign goods are not exported." ("German-American Commercial Relations", *A.J.I.L.*, 19 (1925), p. 692.)

[2] Cf. Art. 1 of the Protocol forming part of the Treaty with Turkey of 1 March, 1930 (*L.o.N., T.S.*, vol. 108 (1930), p. 432). For an instance of an exceptional case in which m.f.n. treatment ensures a better position than national treatment, see Art. 8 of the Treaty with Switzerland of 6 Sept. 1855 (Handbook, *loc. cit.* in note 8 (p. 101) above, p. 669).

[3] See, *e.g.*, Art. 4 of the Treaty with Poland of 26 Nov., 1923 (*L.o.N., T.S.*, vol. 28 (1924), pp. 432–3).

crimination in favour of the beneficiary, that third States constitute the *tertium comparationis*, and that it does not require compliance with any definite and objective rules of conduct.

(3) The continuity in, and universality of, the application of the m.f.n. standard is due to its functions which are in constant demand: its egalitarian function and its part as an agency for the automatic adaptation of treaties and for the rationalization of inter-State relations. The indefiniteness and elasticity of the standard and the automatic character of its operation enable it effectively to discharge these functions.

(4) The classification of the types of m.f.n. clauses may be limited to two principal categories: unilateral and bilateral, and conditional and unconditional m.f.n. clauses. The presumption is in favour of the bilateral and unconditional interpretation of m.f.n. clauses.

(5) Treaties are the legal basis of m.f.n. clauses, but out of the multitude of treaties concluded throughout centuries, the standard of m.f.n. treatment has emerged with the essential features enumerated under (2). There are innumerable m.f.n. clauses, but there is only *one* m.f.n. standard.

(6) British State practice does not reveal any indication that either this country or any of the other contracting parties envisage any beneficiaries other than themselves in relation to the m.f.n. standard under international law.

(7) The scope of the m.f.n. standard is mainly, but not exclusively, limited to the field of international economic law in the wider sense of the term.

(8) Exceptions to the operation of the standard are the normal means of limiting its scope. Exceptions in favour of preferential treatment cannot be presumed. Exceptions based on considerations of national policy may be presumed on grounds other than those to be derived from the m.f.n. standard. Exceptions on grounds of international public policy are overriding and suspend the operation of the m.f.n. standard.

(9) The growth of collective planning has led to adaptations of the standard to such changed conditions in spheres affected by the transformation of national economies and of world trade, but it has not brought about the breakdown of the m.f.n. standard. The result of this development has been:

(*a*) to impair the automatic operation of the standard;

(*b*) to change the emphasis from the positive to the negative functions fulfilled by the standard and, by the combination of the m.f.n. standard with that of equitable treatment, to produce proportionate equality of treatment on a m.f.n. basis;

(*c*) to lead to an increase in the customary types of exceptions;

(*d*) to make the application and durability of the m.f.n. standard more elastic.

(10) Circumventions and infractions of the m.f.n. standard are, in the long run, kept in check by the reciprocal interest of the contracting parties in its operation.

(11) Disputes on the interpretation and application of the m.f.n. standard are eminently justiciable disputes.

(12) A comparison between the m.f.n. standard and the other standards of international economic law leads to the following conclusions:

(*a*) The m.f.n. standard, far from interfering with the operation of the minimum standards of international law, contributes to their generalization.

(*b*) In an international system composed of more than three States, the m.f.n. and preferential standards are mutually exclusive.

(*c*) The standard of reciprocal treatment is compatible with the m.f.n. standard if conceived as implying the bilateral grant of m.f.n. treatment. Otherwise, the objects of the two standards are different. The aim of the m.f.n. standard is the prevention of discrimination between foreign States; that of the reciprocity standard the identical treatment of the contracting parties.

(*d*) The standard of equitable treatment may require discrimination between foreign States and, to this extent, is incompatible with the m.f.n. standard. Used as a subsidiary standard, the former has contributed to the creation of a state of proportionate equality on the m.f.n. basis.

(*e*) The standard of the open door, though identical in its object with the m.f.n. standard, differs from it in that discrimination in favour of one of the contracting parties by the promisor is incompatible with the former.

(*f*) The object of the national standard is inland parity, whereas the m.f.n. standard aims at foreign parity. In case of doubt, the national standard implies the m.f.n. standard. If both standards are applicable to the same subject-matter, the presumption is in favour of their cumulative application.

WHO ARE BRITISH PROTECTED PERSONS?

By J. MERVYN JONES, M.A.
Fellow of Gonville and Caius College, Cambridge

THE position of British Protected Persons has hitherto received little attention from writers on constitutional and international law. The practical importance of the question is obvious from the fact that the number of such persons runs to many millions. Yet of their position there is little or nothing to be found in the text-books. This may partly be accounted for by the fact that questions regarding their status rarely arise in the experience of English practitioners and do not come before the courts. The position of British Protected Persons is largely governed by the practice and prerogative of the Crown, but this practice is now so settled that the main principles can be stated with considerable certainty and detail.[1] First it will be well to clear up a confusion which may exist in the minds of some English lawyers regarding the conception of nationality. The British Nationality and Status of Aliens Act, 1914, does not, in spite of its title, define nationality; it deals with the *status of a British subject* which is a *type* of British nationality. Nationality is not in fact a technical term of English law at all; the literature of the common law speaks of "subjects", "denizens", and "naturalized persons", but the use of the word "nationality" is comparatively recent and has been borrowed from international usage.[2] Nationality is a conception which belongs to international law. It only arises because of the existence of separate states, without which it would have no meaning. Similarly, the term "nationals" is derived from international law and practice, and its meaning is to be found there and not in any system of municipal law. This is not to say that international law defines the conditions in which the status of nationality arises in any particular state. If, however, we are to know what is the legal conception of "nationality" and "nationals" in general, it is to international, not municipal, law that we must turn. The word "nationals" means all those persons who are connected with a State by a special legal tie and whom a State is entitled to protect in its relations with other states. It is equivalent to the French word "ressortissants", and it will be found that in treaties which are in English and in French, such as the peace treaties after the war of 1914–18, the two terms are used one as equivalent of the other.[3] A state's nationals include (*a*) individuals and (*b*) juridical persons. It is sufficient for the present purpose to say that those juridical persons which are created under the law of the State are its nationals. As regards individuals (the subject of this article), the legal tie

[1] I am greatly indebted to Mr. W. E. Beckett, C.M.G., for valuable advice and assistance in writing this article, and for making it possible to obtain the information on which it is based. The responsibility for any statements made in it, or for any opinions expressed in it, is, however, entirely mine.

[2] The word itself is said to originate in English not earlier than 1828: *Shorter Oxford Dictionary* (1936).

[3] See *Kahane* (*Successor*) v. *Parisi and the Austrian State* decided by the Austro-Roumanian Mixed Arbitral Tribunal: *Annual Digest of Public International Law Cases* (1929–30), Case No. 131. This case involved the interpretation of the word "nationals" ("ressortissants") used in the text of Article 249 (e) of the Treaty of St. Germain, 1919.

is described in the language of English law as "allegiance". Such allegiance may be regarded as direct or indirect. Indirect allegiance arises when a person owes allegiance to a local government or ruler and the latter is under the protection or suzerainty of another State. The precise conditions in which the tie comes into existence are defined by each State by its own legislation. A State may, however, have, and nearly all composite states do have, various classes of individuals who are bound to it by this legal tie, i.e. who are its nationals. These classes are described by different names in different systems of law. For instance, French nationals ("ressortissants") include (*a*) *citoyens français* who are entitled to full civil and political rights, (*b*) *sujets français*, meaning natives of certain colonial territories, and (*c*) protégés, including all persons who habitually receive French protection.[1] Similarly British nationals, so far as individuals are concerned, may, broadly speaking, be divided into two main classes: (*a*) British subjects, and (*b*) British Protected Persons.[2] As regards British subjects, these consist very roughly of about three hundred million people. Their claim to the status of a British subject is based on the British Nationality and Status of Aliens Acts, 1914–43, and on corresponding legislation in the Dominions in so far as it adopts the provisions of these Acts. Broadly speaking, the status of a British subject arises in three ways: (*a*) birth "within His Majesty's dominions and allegiance," (*b*) naturalization, and (*c*) birth "out of His Majesty's dominions" in certain circumstances defined by the Acts. The word "dominions" here is used in the technical common law sense. It excludes protectorates, British protected states, mandated states and the Indian native states. Further, it is important to distinguish "Dominions" (in the sense of all territories, including the United Kingdom, the British Dominions and the Colonies which are British under English law) from "dominions" in the sense in which that word is used in the Statute of Westminster, 1931.

As regards the second main class of British nationals—British Protected Persons—their position is not regulated by any statute but by the prerogative. They fall under two main heads: (I) those who derive their status as British Protected Persons from their connection with a protectorate, protected state, or mandated territory, and (II) certain other individuals who have been granted the status of a British Protected Person by a decision of the Secretary of State for Foreign Affairs for particular reasons. Of these two classes the first is important and includes about one hundred million people. The second class is insignificant since it comprises only a few thousand people who are diminishing in numbers. They can be described briefly as follows:—

(*a*) In the past the Dominions, India, and several British Colonies used

[1] See Scelle, *Précis du droit des gens* (1934), vol. II, p. 137. On the meaning of protégé see *Pablo Nájéra Case*, a decision of the French-Mexican Claims Commission reported in the *Annual Digest of Public International Law Cases* (1927–8), Case No. 206.

[2] It is not necessary that the nationals of a state should possess rights of citizenship in every portion of the State's territories, and in fact in a composite state it is rarely the case that they do. Generally speaking, the nationals of a composite state possess rights of citizenship in one part of the state's territories, whereas elsewhere within these territories they are treated in many respects as aliens. This position is illustrated, and recognized in relation to the British Empire, by Section 26 (1) of the British Nationality and Status of Aliens Act, 1914. Thus it will be seen that even as regards British subjects it is not true to say that they enjoy full rights of citizenship in every part of the dominions of His Majesty.

to grant what was called a "local naturalization", that is to say, a naturalization which gave the person naturalized the status of a British subject within the territory concerned, but did not purport to grant it elsewhere.[1] This practice is dying out, but it has not entirely ceased; and there are still a number of persons who hold local certificates of naturalization. When these people travel abroad they cannot be given passports as British subjects because they are not British subjects abroad. They are, however, usually given passports as British Protected Persons.[2]

(*b*) It has happened in the past that certain people or their fathers have been by error recognized as British subjects and granted passports and British protection on the faith of that status. It is then found that their acceptance as British subjects was based on error, but to withdraw all British protection from them abroad would create hardship, perhaps leaving them completely stateless. They are therefore granted the status of a British Protected Person.

(*c*) In most countries exterritorial jurisdiction has now virtually ceased to exist, Spanish Morocco being the only territory in the world where it is in force at present. There was a right in those countries where the system existed to grant protection to various individuals on grounds such as that they were servants in a Consulate, or held a certain position as representatives of a British commercial firm. These persons became British Protected Persons. It is a ground for that status which has practically ceased to exist, and this class will disappear altogether when those individuals now living who have acquired it are dead.

We must now consider the position of the first class of protected persons set out above, which is by far the more important, i.e. those who derive their status as British Protected Persons from their connection with a British protectorate, protected state, mandated territory or Indian native state. These may be divided into the following categories:

(*a*) The Indian native states.[3] British Protected Persons who derive their status from connection with these States are the most numerous category. In order to qualify as a British Protected Person under this heading a person must be considered to be a subject of the ruler of that State. In many cases the native States have passed legislation which lays down the rules for determining who their subjects are. In other cases, particularly in the smaller states, there is in fact no legislation. In that event the question is decided administratively by applying the same sort of rules as would probably be enacted if the rulers had legislated.

(*b*) The next class of British Protected Persons are those whose status is derived from their connection with a British protected state. British protected states include all the Malay States, federated and unfederated,

[1] The adoption by British Dominions of Part II of the British Nationality and Status of Aliens Act, 1914, and the application of Section 8 of that Act to the Colonies, enabled the Dominions and Colonies to grant "Imperial" certificates of naturalization. But the old powers of granting local naturalization are saved by Section 26 of the Act.

[2] As to the status of locally naturalized persons see *R.* v. *Francis Ex parte Markwald* [1918] 1 K.B. 617 and *Markwald* v. *Attorney-General* [1920] 1 Ch. 348.

[3] These states are under the "suzerainty" of the Crown and their position is in certain respects different from that of other states protected by Great Britain. The position of subjects of the Indian Princes and States as protected persons is specially recognized by Section 15 of the Foreign Jurisdiction Act, 1890.

the British protected states along the shores of the Persian Gulf, such states as Zanzibar in Africa, and Sarawak in the Pacific.[1]

Here, as in the case of the Indian States, the criterion is whether the person concerned must be considered a subject of the ruler of the State. In many cases this is defined by local legislation or customary law. In other cases it has to be decided administratively, because there is no law at present defining it, by applying principles similar to those which would be embodied in legislation if there was any.

(*c*) The British Protectorates. These are territories, mainly in Africa, where there is no native ruler. Consequently the rules defining who can claim the status of a British protected person by virtue of their connection with these protectorates have to be laid down by the British Crown. These rules are laid down by the British Protected Persons Order in Council, 1934.[2] This Order does not purport to define all British Protected Persons, but only sets out the rules for determining how the right is claimed on the basis of connection with those territories which are scheduled in the Order. The Order recites that "whereas by treaty, grant, usage, sufferance, and other lawful means, His Majesty has power and jurisdiction within the territories mentioned in the schedule to this Order," and "whereas certain persons who are regarded as belonging to those territories are afforded His Majesty's protection, and are known as British Protected Persons it is expedient to define in relation to those territories the persons who are so regarded as

[1] The following are examples of British Protected States. No attempt is made here to distinguish between those possessing nationality laws of their own and those which do not possess such laws:—

1. *Federated Malay States*
   - Negri Sembilan
   - Pahang
   - Perak
   - Selangor
2. *Unfederated Malay States*
   - Brunei
   - Johore
   - Kedah
   - Kelantan
   - Perlis
   - Trengganu
3. North Borneo
4. Sarawak
5. Tonga

The Secretary for the Colonies is responsible for relations with these territories.

Territories for relations with which the Secretary of State for India is responsible.

(A) *Indian States*

The complete list of Indian States is too long to be reproduced here. A list will be found in the *India Office List* (1939), p. 128, of the more important Indian States.

(B) *Other Territories*

- Bahrein
- Koweit
- Sultanate of Muscat and Oman
- The Trucial Sheikdoms

Territories for relations with which the Secretary of State for Foreign Affairs is responsible.

- Anglo-Egyptian Sudan
  (Protection is only afforded to persons holding Sudanese passports.)

[2] S. R. & O., 1934, No. 499.

belonging thereto". "The territory" means any territory scheduled in the Order.[1] Article 2 of the Order reads as follows:

"The following persons shall be regarded as belonging to the territory:

(*a*) Any person born (whether before or after the entry into force of this Order) within the territory who is not, at the time of his birth, a British subject, and who does not, at the time of his birth, possess under the law of some other State the nationality of such State;

(*b*) Any person born (whether before or after the entry into force of this Order) out of the territory who is not, at the time of his birth, a British subject and does not possess under the law of some other state the nationality of such state and whose father was, at the time of that person's birth, a person who under this Order is regarded as belonging to the territory and was himself born within the territory; Provided that any person born after the death of his father (whether before or after the entry into force of this Order) shall be regarded as belonging to the territory if he would, if born before his father's death, have been so regarded."

It will be observed that the relevant date under both paragraphs (*a*) and (*b*) for the purpose of determining the status of the person in question is that of the person's birth. It is possible, however, that a British Protected Person to whom the Order applies may subsequently acquire the nationality of some other State in which he is resident, and in that case Article 4 of the Order provides that he shall cease to be "regarded as belonging to the territory".[2] The Order applies only to the territories scheduled therein, and no State that has a native ruler and a local nationality law (or power to enact such law) is scheduled therein. In the case where a local law exists, or could exist, that law is applicable to determine who is a British Protected Person by reason of connection with that particular State. Such connection is, in the case of persons to whom the Order applies, defined in strict terms of reference to birth within the territory,

[1] Following is the list of scheduled territories:—

BRITISH PROTECTORATES:

Bechuanaland Protectorate	British Solomon Islands Protectorate
*Gambia Protectorate	*Kenya Protectorate
*Nigeria Protectorate	Northern Rhodesia
Northern Territories of the Gold Coast	Nyasaland Protectorate
*Sierra Leone Protectorate	*Somaliland Protectorate
Swaziland	Uganda Protectorate

* Not to be confused with the *Colonies* of the same names.

MANDATED AREAS

Cameroons under British Mandate	Togoland under British Mandate
Tanganyika Territory	

[2] Persons born in British Colonies as opposed to British Protectorates, and whether of native race or otherwise, are British subjects under the British Nationality Acts on the same footing as persons born in the United Kingdom or elsewhere in H.M. Dominions. Such persons may lose their nationality in the circumstances laid down in Section 13 of the British Nationality and Status of Aliens Act, 1914. In the case of British Protected Persons if the person belongs to a British Protectorate which has its own nationality law (and to which therefore the provisions of Article 4 of the 1934 Order do not apply) the question whether or not he loses his status as a British Protected Person by becoming naturalized in another State depends on the nationality law of the territory to which he belongs. If, however, a person belongs to a territory which has no nationality law of its own and is also not scheduled in the 1934 Order (i.e. the Malay States and the native States of India) His Majesty's Government would not in practice continue to claim as a British Protected Person anyone who had while in a foreign state outside the territory to which he normally belongs become duly naturalized therein. Naturalization conferred upon a person who was not at that time in the foreign state which has naturalized him would not in principle (following the analogy of Section 13 of the British Nationality and Status of Aliens Act, 1914) be recognized as altering his status as a British Protected Person.

or, in the case of that person's wife, residence with her husband in the territory with the permission of the government, provided that she is not a British subject and does not possess the nationality of any other State.

(*c*) Finally, there are the British mandated territories, which fall into two classes: (i) Palestine and Transjordan, and (ii) the rest. Palestine is in a similar position to those States where there is a ruler, because the rules for determining who is a citizen of Palestine are laid down in Palestinian legislation.[1] In the case of other mandated territories this is not so, and therefore they have been dealt with in the British Protected Persons Order in Council in the same manner as the protectorates.

From the point of view of international law the United Kingdom, the Colonies, the Protectorates, protected States and mandated territories are all territories for which the British Government is internationally responsible, and in respect of which it has jurisdiction. From the point of view of English municipal law, however, the Protectorates, mandated territories, protected states, and Indian native states are regarded as foreign territory many of which are governed by the Crown under the Foreign Jursidiction Act. This distinction of municipal law has tended to obscure the position under international law.[2] Similarly, British Protected Persons are regarded as aliens in the United Kingdom, while no British subject is so regarded. Here again the domestic distinction under municipal law tends to obscure the much more important fact that both classes are British nationals enjoying abroad the protection of the Crown under international law.[3]

One of the most important species of evidence, almost indispensable at the present day, as to whether an individual is or is not a British national, is the possession or otherwise of a British passport. Both classes—British subjects and British protected persons—are granted British passports, and on their passports they are described as British subjects or British Protected Persons according to the class in which they fall. In many cases a passport will give further information as to how they derive their title to it. For instance, the passport of a Palestinian citizen will not merely say that he is a British Protected Person but will *show* that he is a Palestinian citizen, and the passport of the subject of an India ruler will very probably show that he is a native of this or that Indian state. Similarly, a British subject from South Africa is very likely to have a passport which

[1] See the texts published by the Colonial Office under the title "The Palestine Citizenship Orders (1925–41) Consolidated" and the Palestine Citizenship (Amendment) Order 1942, S.R. & O. 1942, No. 1177. Transjordan has had a seperate Nationality Law since 1928 and is in the same position as Palestine for the present purpose.

[2] This is well illustrated by the recent case of *R.* v. *Ketter* [1940] 1 K.B. 787. The Palestinian in that case was rightly held not to be a British subject. The Court failed, however, to point out that he was nevertheless a British national. If this distinction had been appreciated there would have been a short and simple answer to the argument on behalf of Ketter based on the Treaty of Lausanne: he was a British national; but he was not a British subject.

[3] See *R.* v. *Ketter, ibid.* See also the earlier case of *R.* v. *Campbell* [1921] 2 K.B. 473 (which was not, however, cited in *R.* v. *Ketter*) concerning the position of an Egyptian who was a protected person by virtue of the British Protectorate then existing in Egypt. It is interesting to compare this case with a decision of the Anglo-Austrian Mixed Arbitral Tribunal in *National Bank of Egypt* v. *Austro-Hungarian Bank: Annual Digest of Public International Law Cases* (1923–4), Case No. 10. There it was held that an Egyptian who was not a British subject but was a British Protected Person was a British national. The comparison clearly brings out the point made above.

will show, in addition to the fact that he is a British subject, the fact that he is a citizen of the Union of South Africa.[1]

It may often happen that a person may be at one and the same time both a British subject and a British Protected Person. For instance a certain number of British subjects also possess Palestinian citizenship. There is a large number of people from India who are, at one and the same time, British subjects by virtue of their connection with British India, and British Protected Persons by virtue of their connection with some Indian state. It is a sort of domestic double nationality. The fact, however, that it is not an ordinary case of double nationality is shown in many ways, but *inter alia* in the following. If A becomes a French citizen by naturalization he will lose his status as a British subject. If, however, he were to acquire Palestinian citizenship he would not cease *ipso facto* to be a British subject because Palestine is not a "foreign state" within the meaning of Section 13 of the British Nationality and Status of Aliens Act, 1914.

All British Protected Persons are, in foreign territory, treated as British nationals and are entitled to the same protection as British subjects. Their position under English municipal law differs from that of British subjects in the following respects:

(1) A British Protected Person may not land in the United Kingdom without special permission. He is an alien for the purposes of the Aliens Orders.

(2) In British territory he has not the political rights of a British subject, e.g., he cannot vote at Parliamentary elections.

(3) As the Foreign Marriage Act, 1892, applies only to British subjects, British Protected Persons do not enjoy the benefit of that Act.

(4) On the marriage of a British Protected Person, his wife does not acquire the status of a British subject unless he himself is also a British subject, and her position in that event depends on the British Nationality and Status of Aliens Acts, 1914–43. Whether by marriage she acquires the status of a British Protected Person depends on what category her husband belongs to. Similarly, the status of the children will depend on the class into which they fall. The wives and children of persons who have been accorded British protection for special reasons may apply separately to the Foreign Office for protection.

It remains to point out that British Protected Persons are persons who habitually receive protection or are entitled to such protection. Many such persons never travel and do not therefore ordinarily require protection. Their position, however, must be distinguished from that of nationals of another state who, for a temporary purpose, in a particular country, or for reasons of convenience, are afforded the diplomatic assistance and, if need be, the protection, of His Majesty's Government: e.g., it may be that where a foreign Power is at war with a particular state that, in accordance with international courtesy, Great Britain, being neutral, undertakes the protection of the interests and nationals of the foreign Power. This *ad hoc*

[1] The decision of the House of Lords in *Rex* v. *Joyce* (*The Times*, February 2, 1946) does not appear to affect the rules set out above. Although, at the time of writing, no full report of this case is available it seems only to decide that the possession of a passport may, in certain circumstances, keep alive an allegiance and protection that might otherwise have ceased or been shaken off. A passport may, of course, be erroneously granted to a person not entitled to it, e.g., a resident alien; the grant of a passport does not *ipso facto* make him a British Protected Person. (See p. 124 above).

protection does not make that Power's nationals British Protected Persons in the technical sense discussed in this article. Similarly a state may be too poor, or its interests in a foreign country may be too slight, to justify the maintenance of a full diplomatic establishment or mission. In that event it may be that Great Britain undertakes the protection of the interests or nationals of that state. This would not make such nationals British Protected Persons. British Protected Persons include only those persons who habitually receive British protection.

Conclusions

(1) Nationality has acquired a distinct technical meaning in the usage of international law. This usage covers a wider field than municipal law and the term nationals comprises all those who are bound by a special legal tie to the State, and who are entitled to be protected by that State as against foreign governments.

(2) The above-mentioned usage is established in international law and practice.

(3) According to British practice British nationals consist of (*a*) British subjects, either at common law or by statute under the British Nationality and Status of Aliens Acts, 1914–43, (*b*) British Protected Persons, (*c*) juridical persons incorporated under the laws of a British territory. As has been pointed out, the British Nationality and Status of Aliens Acts do not contain a complete code of British nationality, but deal only with the status of a British subject. Common legal parlance frequently uses the expression British nationality as equivalent to the status of a British subject under these Acts; but this usage is incorrect. A British subject is a type or species of British national.[1]

(4) The distinctions of municipal law between various types of relations between individuals and the State, carry no authority in international law, so far as the general conception of nationality is concerned. International law bases its idea of nationality on the element in common between these types: i.e. the special legal tie with the State. Where therefore English case-law speaks of "subjects", "denizens", and "naturalized persons", and the constant practice of the prerogative, expressed in administrative decisions and in the British Order in Council of 1934, speaks of British Protected Persons, international law comprehends all these under the title "nationals".

(5) A British Protected Person is a British national who habitually, and not by reason only of his status as a British subject, receives the protection of His Majesty's Government, or who would, in case of need, be entitled to enjoy such protection on the principles set out above.

[1] For drafting purpose and for special reasons the expression "British subject" is used in certain Orders in Council so as to include a British Protected Person, i.e. in the Orders in Council relative to Persia (1913), China (1925), and Ethiopia (1934). S.R. & O. references are as follows: (Persia) S.R. & O. (1913) No. 1114; (China) S.R. & O. (1925) No. 603; (Ethiopia) S.R. & O. (1934) No. 360. So, too, Section 17 of the Allied Powers Maritime Courts Act, 1941, includes in the definition of a British subject a British Protected Person. On the other hand, Section 5 (1) of the Treachery Act, 1940, provides that an "enemy alien" means "a person who possesses the nationality of a state at war with His Majesty not being either a British subject or a person certified by the Secretary of State to be a British Protected Person". This last example, however, serves to illustrate that even internally a British Protected Person is not altogether in the same position as an alien.

THE PLACE OF THE CALVO CLAUSE IN INTERNATIONAL LAW

By K. LIPSTEIN, Ph.D. (Cantab.)

*Calvo Doctrine and Calvo Clause**

When, in 1868, Calvo first announced the doctrine which was to bear his name,[1] he claimed that European States should refrain from intervening, diplomatically or otherwise, in South America in so far as the protection of private property, including debts, was concerned.[2] In Calvo's opinion, States, and South American States in particular, were not to be embarrassed by international claims based on vicarious responsibility for acts of their officials, riots and insurrections which had resulted in damage to property belonging to aliens,[3] provided that the damage or the failure to repair it was not due to measures of a discriminatory character.[4] Claims of a proprietary nature were to be brought by the aliens themselves and were exclusively subject to municipal law and juridiction.[5]

These sweeping statements, put forward under the impact of British and French intervention in Argentina and Uruguay and of the French interference in Mexico,[6] failed to obtain the approval of international lawyers, both in Europe and in the United States. The modern procedure of international arbitration was attracting increasing attention, and the proposal to treat claims of a proprietary nature brought by aliens as claims in the nature of municipal law, subject to the exclusive jurisdiction of the courts of the defendant State, had little to commend itself. But even if Calvo's attempt to exclude claims on the ground of State responsibility for injuries to the person or to property, due to acts of subordinate officials, riots, and insurrections, was unsuccessful, it exercised a profound influence in the sphere of contracts concluded between States and aliens. Here, the Calvo doctrine, in the modified form of a contractual clause known as the Calvo Clause, has established itself and is still being incorporated in contracts

* The following abbreviations will be used:

Decisions I, II = Decisions and Opinions of the Commissioners in accordance with the Convention of 19 November 1926, between Great Britain and the United Mexican States, 2 vols., 1931, 1933.

Moore, *Digest* = Moore, *A Digest of International Law*. 8 vols., 1906.

Moore, *Internat. Arb.* = Moore, *History and Digest of the Arbitrations to which the United States has been a Party*, 6 vols., 1898.

A.J. = *American Journal of International Law.*

Opinions I, II, III = Opinions of Commissioners under the Convention concluded 8 Sept., 1923, between the United States and Mexico, 3 vols., 1927, 1929, 1931.

Ralston, I = Ralston, *The Law and Procedure of International Tribunals*, Revised Edition, 1926.

[1] Calvo, *Le droit international théorique et pratique* (5th ed., 1896), I, par. 185–205, pp. 322–51; III, par. 1280–96, pp. 142–55; VI, par. 256, p. 231. See also Hershey in *A.J.*, 1 (1907), pp. 26–45: Saavedra Lamas, *Calvo* (*La doctrine de Calvo*), in *Académie Diplomatique Internationale*, I, p. 386; Fritsch in Strupp, *Wörterbuch des Völkerrechts*, I (1924), p. 177.

[2] Calvo, *loc. cit.*, I, par. 185–204, pp. 322–51.

[3] Calvo, *loc. cit.*, III, par. 1280–96, pp. 142–55.

[4] Calvo, *loc. cit.*, III, par. 1280, p. 142; VI, par. 256, p. 231

[5] Calvo, *loc. cit.*, I, par. 205, p. 351; III, par. 1280, p. 142.

[6] Calvo, *loc. cit.*, I, par. 185–204, pp. 322–51.

concluded between South-American States and alien contractors or concessionaries.[1]

The Elements of the Calvo Clause

An analysis of contracts containing this provision which have come before international tribunals, shows that the Calvo Clause, as employed with some uniformity by South American States during the last seventy years, contains a number of stipulations varying in character and bearing upon various aspects of the principal contract.

(*a*) *Submission to Local Jurisdiction.* In the first place, the clause provides for the submission of the alien contractor to the jurisdiction of the courts of the contracting State. The parties agree that disputes shall be decided "by the judicial tribunals of Venezuela",[2] "by the ordinary tribunals of the Republic",[3] "by the competent tribunals of the respondent Government",[4] or "by the tribunals of the Republic".[5] They are subject "exclusively to the authorities",[6] or "to the decisions of the Courts of the Republic",[7] or, in short, "to the jurisdiction of the Courts of the Republic".[8]

Other contracts provide for private arbitration,[9] for submission to the courts of either party,[10] or attempt to solve the question of jurisdiction in such ambiguous terms as "they shall remain subject to the laws of the country".[11]

This part of the clause is in conformity with a well-established and world-wide practice which attempts, in contracts involving a foreign element, to determine in advance the jurisdiction of a particular municipal court, or of the courts of a particular country, by means of an express submission.[12]

(*b*) *Free Choice of Law.* In the second place, the clause includes an express

[1] See Borchard, *Diplomatic Protection of Citizens Abroad* (1917), par. 114 (2), p. 294; par. 371–9, pp. 792–810; *A.J.*, 20 (1926), p. 538; Eagleton, *Responsibility of States in International Law* (1928), pp. 168–76; Feller, *The Mexican Claims Commissions* (1935), p. 184; *A.J.*, 27 (1933), pp. 461–8; De Beus, *The Jurisprudence of the General Claims Commission, United States and Mexico* (1938), pp. 49–87; Freeman, *The International Responsibility for Denial of Justice* (1938), pp. 469–95; Dunn, *The Protection of Nationals* (1932), pp. 169–72; Summers in *Revue de droit international*, 7 (1931), pp. 567–81; Ténékidès in *Revue générale de droit international public*, 43 (1936), pp. 270–84; Harvard Research in International Law, *Responsibility of States*, art. 17, *A.J.*, 23 (1929), Supplement, pp. 202–15. See also *Journal of Comparative Legislation*, 3rd ser., 26 (1944), pp. 55–9.

[2] *Flannagan, Bradley, Clark & Co.* v. *Venezuela*, Moore, *Internat. Arb.*, IV, p. 3564.

[3] *Coro and La Vela Ry. and Improvement Co.*, Ralston, I, no. 81, p. 65; *Woodruff* Case, Ralston, I, no. 75, p. 62.

[4] *French Company of Venezuelan Railroads*, Ralston, I, no. 111, p. 84; *Fitzgerald Concession*, Ralston, I, no. 70, p. 58; *Turnbull* v. *Venezuela*, Moore, *Internat. Arb.*, VI, pp. 306–7.

[5] *Orinoco S.S. Co.* Case, Ralston, I, no. 79, p. 64, Scott, *Hague Court Reports*, I (1916), p. 226; *Martini* Case, Ralston, I, no. 85, p. 66; *Selwyn* Case, Ralston, I, no. 84, pp. 65–6; *American Electric and Manufacturing Co.* Case, Ralston, no. 78, p. 64.

[6] *Antofagasta and Bolivia Ry. Co.* Case; *Robert Stirling* Case, Ralston, I, no. 86, p. 68.

[7] *Pitol* Case, Feller, *The Mexican Claims Commissions* (1935), pp. 196–9.

[8] *International Fisheries Co.* Case, *Opinions* I, p. 21, at p. 22; *Mexican Union Ry.* Case, *Decisions*, I, p. 157, at p. 159; *Interoceanic Ry. of Mexico* Case, *Decisions*, II, p. 118, at p. 121 (5).

[9] *North and South American Construction Co.* v. *Chile*, Moore, *Internat. Arb.*, III, p. 2318; *Tehuantepec Ship and Canal Co.* Case, *ibid.*, III, p. 3132.

[10] *Tehuantepec Ship and Canal Co.* Case, *loc. cit.*

[11] *Nitrate Ry. Co. Ltd.* v. *Chile*, Ralston, I, no. 86, p. 67.

[12] Cheshire, *Private International Law* (2nd ed., 1938), pp. 594, 597; Dicey, *Conflict of Law* (5th ed., 1932), General Principle IV, and Rule 95 (3). See also *North American Dredging Co.* Case, *Opinions*, I, p. 21, at p. 27 ; *Mexican Union Ry.* Case, *Decisions*, I, p. 157, at p. 164 (12); *Interoceanic Ry. of Mexico* Case, *Decisions*, II, p. 118 at p. 122 (7).

provision concerning the law applicable to the contract. The contract is "subject to the laws of the Republic".[1] In case of a dispute, it "shall be decided in accordance (or 'in conformity') with the laws of the Republic",[2] or with "the common law"[3] or it shall be "determined in the ordinary course of law".[4]

This method of determining the law applicable to a contract is known, and to a greater or lesser degree accepted, by most systems of private international law under the heading of "free choice of law", and calls for no further comment.[5] However, in recent times this portion of the Calvo Clause which embodies the choice of law made by the parties has been couched in more sweeping terms. It is now generally provided that the alien contractors, their assignees and all persons having an interest in a foreign contracting corporation "shall not claim . . . nor shall they have any rights or means to enforce the same than those granted by the laws of the Republic to Mexicans";[6] they "shall be considered as having all the rights and obligations which the Federal Constitution imposes on Mexicans and aliens respectively and shall enjoy the temporary exemptions provided by the present law."[7] In this form, the relevant provisions of the Calvo Clause are no longer concerned with the free choice of any particular system of municipal private law, but with the submission of the alien contractor to the law of the contracting government as a whole, including its administrative law and jurisdiction.

(*c*) *Sphere of Application.* Next follows a provision delimiting the subject matter in respect of which the submission to local jurisdiction and the free choice of law is to operate. Here a great variety of terms, ranging from the narrowest to the widest, can be found. Generally speaking, it may be said that the tendency has been towards increasing the sphere of the clause.

In its original version, the clause applied "for the ends of the contract"[8] to "all questions that may arise under this arrangement",[9] to "the contract or any decision upon matters growing out of it",[10] to "doubts and controversies arising from the provisions of the contract",[11] or to "all questions concerning the interpretation and execution of the contract".[12] In its

[1] *Nitrate Ry. Co. Ltd.* v. *Chile*, Ralston, I, no. 86, p. 67; *Antofagasta and Bolivia Ry. Co.* Case; *Robert Stirling* Case, Ralston I, no. 86, p. 68.

[2] *Turnbull* Case, Moore, *Internat. Arb.* VI, pp. 306–7; *Orinoco S.S. Co.* Case, Ralston, I, no. 79, p. 64, Scott, *Hague Court Reports*, I, p. 226; *Martini* Case, Ralston, I, no. 85, p. 66; *American Electric and Manufacturing Co.* Case, Ralston, I, no. 78, p. 64; *Fitzgerald Concession*, Ralston, I, no. 70, p. 58.

[3] *Woodruff* Case, Ralston, I, no. 75, p. 62.

[4] *Flannagan, Bradley, Clark & Co.* v. *Venezuela*, Moore, *Internat. Arb.*, IV, p. 3564.

[5] *North American Dredging Co.* Case, *Opinions*, I, p. 21, at p. 27.

[6] *North American Dredging Co.* Case, *Opinions*, I, p. 21, at p. 22; *International Fisheries Co.* Case, *Opinions*, III, p. 206, at p. 212; *Mexican Union Ry. Co.* Case, *Decisions*, I, p. 157, at p. 159; *Interoceanic Ry. of Mexico* Case, *Decisions*, II, p. 118, at p. 121; *El Oro Mining and Ry. Co. Ltd.* Case, *Decisions*, II, p. 141, at p. 146.

[7] *Pitol* Case, Feller, *The Mexican Claims Commissions* (1935), pp. 196–9.

[8] *North and South American Construction Co.* v. *Chile*, Moore, *Internat. Arb.*, III, p. 2318.

[9] *Tehuantepec Ship and Canal Co.* Case, Moore, *Internat. Arb.*, III, p. 3132.

[10] *Flannagan, Bradley Clark & Co.* v. *Venezuela*, Moore, *Internat. Arb.*, *IV*, *p.* 3564; *Woodruff* Case, Ralston, I, no. 75, p. 62.

[11] *French Company of Venezuelan Railroads* Case, Ralston, I, no. 111, p. 84; *Turnbull* v. *Venezuela*, Moore, *Internat. Arb.*, VI, pp. 306–7; *Fitzgerald* Case, Ralston, I, no. 70, p. 58; and see the cases cited above, note 10.

[12] *Rogerio & Co.* v. *Bolivia*, Ralston, I, no 88, p. 69; *Orinoco S.S. Co.* Case, Ralston, I, no. 79, p. 64, Scott, *Hague Court Reports*, I (1916), p. 226; *Coro and La Vela Ry. and Improvement Co.* Case, Ralston, I, no. 81, p. 65; *Selwyn* Case, Ralston, I, no. 84, pp. 65–6.

extended form, the clause was made to apply to "any doubts, differences, difficulties and misunderstandings that may arise from or have any connection with, or in any manner relate to, this contract, directly or indirectly".[1] It included "all matters within the Republic concerning the execution of such work and the fulfilment of this contract . . . with regard to the interests and the business connected with this contract [or] in any manner related to this contract",[2] or " all matters the cause and action of which takes place within its territory . . . with respect to matters connected with this contract".[3] Finally, in one case, the clause was to embrace "all questions which may arise".[4]

(*d*) *Waiver of Protection by Home State.* The next part of the clause appears to have been designed as a corollary of the provisions dealing with submission to local jurisdiction and the choice of the municipal law applicable to the contract. The grant, or imposition, of a *locus standi* in the courts of the contracting government is accompanied by a waiver of the right to appeal for the protection of the Home State. The alien contractor "renounces the protection of his government in support of his pretensions".[5] He submits to the demand that henceforth he shall be "without power to exercise diplomatic intervention"[6] and that "under no conditions shall the intervention of foreign diplomatic agents be permitted in any matter related to the contract".[7] Sometimes, "absolute exclusion of all foreign intervention" is even conceded.[8]

(*e*) *Surrender of Rights under International Law.* To a growing extent the contracting State requires not only a renunciation of the formal right to appeal for the protection of the Home State, but also the surrender, in substance, of all future claims of an international character. This demand has been expressed in various formulations, such as "in no case . . . will any international claims be admitted on account of this concession",[9] "doubts and controversies [relating to the contract] shall never be the subject of international reclamations".[10] Finally, in some contracts an attempt has been made to combine the formal waiver of the right to appeal to the Home State with the surrender of all future claims in the international sphere. These contracts contain stipulations such as "the contractor . . . shall be

[1] *Beales, Nobles and Garrison* Case, Moore, *Internat. Arb.*, IV, p. 3548.

[2] *North American Dredging Co.* Case, *Opinions*, I, p. 21, at p. 22; *Mexican Union Ry. Co.* Case, *Decisions*, I, p. 157, at p. 159; *Interoceanic Ry. of Mexico* Case, *Decisions*, II, p. 118, at p. 121; *El Oro Mining and Ry. Co.* Case, *Decisions*, II, p. 141, at p. 146.

[3] *International Fisheries Co.* Case, *Opinions*, III, p. 206, at p. 212.

[4] *Pitol* Case, Feller, *The Mexican Claims Commissions* (1935), pp. 196–9.

[5] *North and South American Construction Co.* v. *Chile*, Moore, *Internat. Arb.*, III, p. 2318.

[6] *Nitrate Ry. Co.* v. *Chile*, Ralston, I, no. 86, p. 67.

[7] *North American Dredging Co.* Case, *Opinions*, I, p. 21, at p. 22; see also *Mexican Union Ry. Co.* Case, *Decisions*, I, p. 157, at p. 159; *Interoceanic Ry. Co. of Mexico* Case, *Decisions*, II, p. 118, at p. 121; *El Oro Mining Co.* Case, *Decisions*, II, p. 141, at p. 146.

[8] *Pitol* Case, Feller, *The Mexican Claims Commissions* (1935), pp. 196–9.

[9] *Coro and La Vela Ry. and Improvement Co.* Case, Ralston, I, no. 81, p. 65.

[10] *Woodruff* Case, Ralston, I, no. 75, p. 62; *Martini* Case, Ralston, I, no. 85, p. 66; *Orinoco S.S. Co.* Case, Ralston, I, no. 79, p. 64, Scott, *Hague Court Reports*, I (1916), p. 226; *Antofagasta and Bolivia Ry. Co.* Case; *Robert Stirling* Case, Ralston, I, no. 86, p. 68; *Flannagan, Bradley Clark & Co.* Case, Moore, *Internat. Arb.*, IV, p. 3564; *Beales, Nobles and Garrison* Case, Moore, *Internat. Arb.*, IV, p. 3548.

considered as Mexican . . .''; "he shall never claim . . . any right as an alien under any form whatsoever".[1]

As pointed out above, the waiver of the right to appeal for the protection of the Home State and the surrender of all future rights under international law are meant to form the counterpart of the submission of the alien contractor to the local jurisdiction and of the contract to the municipal law of the contracting State. It would appear, however, that the counterpart of submission to the jurisdiction of the contracting State is the absence of jurisdiction on the part of all other municipal courts, while the choice of the law of the contracting State as governing the contract operates only to exclude all other municipal systems of private law. As a result, courts and writers have laboured for more than fifty years to reconcile the seemingly inconsistent provisions (i.e. submission to local jurisdiction; choice of local law; waiver of international jurisdiction; surrender of rights under international law) which form the usual contractual Calvo Clause.

Contractual Rights and International Law

(*a*) *In general.* Before discussing whether and to what extent a contracting individual can submit to the local jurisdiction of the contracting State in respect of international claims arising out of a contract and waive rights of an international nature ensuing from a contract, it is necessary to examine in what circumstances a contractual claim assumes an international character.

The great majority of writers are agreed that the failure of a State to fulfil a contractual obligation, unless such a failure is confiscatory or discriminatory in nature, does not automatically result in a breach of international law.[2] However, it has been contended that a breach of contract in municipal law is always to be regarded, in the international sphere, as a measure in the nature of confiscation entailing State responsibility. In the *International Fisheries Co.* Case, Nielsen, the American Commissioner, said in a dissenting opinion:

"In the ultimate determination of responsibility under international law . . . an international tribunal in a case grounded on a complaint of a breach of contract can properly give effect to principles of law with respect to confiscation. . . . International Law does not prescribe rules relative to the forms and the legal effect of contracts, but that law is . . . concerned with the action authorities of a Government may take with respect to contractual rights."[3]

[1] *North and South American Construction Co.* v. *Chile*, Moore, *Internat. Arb.*, III, p. 2318; *North American Dredging Co.* Case, *Opinions*, I, p. 21, at p. 22; *Mexican Union Ry. Co.* Case, *Decisions*, I, p. 157, at p. 159; *Interoceanic Ry. of Mexico* Case, *Decisions*, II, p. 118, at p. 121; *El Oro Mining Co.* Case, *Decisions*, II, p. 141, at p. 146.

[2] Moore, *Digest*, VI, pp. 287 ff., pp. 295 ff., pp. 705–20, par. 996, pp. 723 ff., par. 997; *Internat. Arb.*, IV, p. 3425 ff.; Borchard, *Diplomatic Protection of Citizens Abroad* (1917), p. 799; Drago in *Revue générale de droit international public*, 14 (1907), p. 251, at pp. 255–6.

[3] *Opinions*, III, p. 206, at pp. 241–2. See also Nielsen, dissenting, in *Cook* v. *Mexico*, *Opinions*, II, pp. 266, 269, Nielsen's Reports, p. 390, at pp. 395, 396; *Ina M. Hoffmann and Dulcie H. Steinhardt* v. *Turkey*, American-Turkish Claims Settlement, p. 286, at pp. 287, 288; *Socony Vacuum Oil Co. Inc.* v. *Turkey*, *ibid.*, p. 369, at p. 374; *Dickson Car Wheel Co.* Case, *Opinions*, III, p. 175, at p. 199, Nielsen's Reports, p. 505, at pp. 512–15; *American Bottle Co's Claim*, Nielsen's Reports, p. 339, at p. 340; *Pomeroy's El Paso Transfer Co's* Case, Nielsen's Reports, p. 418, at p. 420, with further references; *Singer Sewing Machine Co.* v. *Turkey*, American-Turkish Claims Settlement, p. 490, at p. 491; *Malamatinis* v. *Turkey*, *ibid.*, p. 603, at p. 605.

Nielsen concludes that, in the view of international law, the failure of a Government to honour its contractual obligations constitutes a confiscation or destruction of property rights in the contract and, as it is confiscation without adequate compensation, that it leads to denial of justice in the wider sense. This doctrine fails to discriminate sufficiently between failure to perform a contract and confiscation, and confuses the absence of easily available remedies with denial of justice entailing State responsibility. If a State fails to honour its commercial obligations, alien creditors will find it difficult, in most countries, to obtain speedy justice in the courts of that State, seeing that most States have provided elaborate safeguards which are designed to protect them from being sued indiscriminately.[1] At the same time, the prevailing practice, which grants immunity to foreign States, whether engaged in transactions of a public or of a private law nature, prevents alien creditors from suing a debtor State in a court of another country. In these circumstances it is understandable that strenuous efforts have been made to assist creditors by treating their claims as international. However, in the absence of rules of international law relating to contracts, contractual claims must be presented in the form of claims for denial of justice, and the failure to honour a contractual obligation constitutes a denial of justice only if it is due to a legislative or administrative measure, if all legal remedies have been exhausted or if none are available at all.

The United States, in a constant practice, have adhered to the generally accepted view and have refused to take up contractual claims of their nationals, except in cases of discrimination or denial of justice which result in what amounts to a confiscatory annulment of contractual rights and concessions.[2]

(*b*) *The Calvo Clause as limited to Contractual Relations proper.* If, then, a contract between an individual and a foreign State cannot, without further extraneous acts for which the foreign State is directly or vicariously liable, form the basis of an international reclamation, it may be argued that a clause in a contract whereby a party submits to local jurisdiction and stipulates not to appeal to the Home State for protection, is strictly confined to the sphere of private law in which alone the contract can be enforced and in which, according to the prevalent opinion, the power of foreign States to intervene does not operate. So understood, the Calvo Clause means what it says: The alien contractor agrees that the contract is to be governed by the law of the contracting State; he submits to the jurisdiction of its courts and acknowledges that the intervention of his Home State for the purpose of pressing his contractual claims is inadmissible.

A number of awards handed down during the last fifty years have so construed the clause and have, therefore, admitted its validity within this

[1] Jèze in *Hague Recueil*, 7 (1925), pp. 172 ff.; Strupp, *ibid.*, 8 (1925), p. 9, at p. 70; Fischer Williams in *Bibliotheca Visseriana*, II (1924), p. 1, at p. 15; *Chapters on Current International Law* (1929), p. 257, at p. 273; Séfériadès in *Hague Recueil*, 51 (1935), p. 5, at pp. 101, 109; Meurer in *Zeitschrift für Völkerrecht* 8 (1914), p. 1, at p. 20.

[2] Wharton, *Digest of International Law*, II (1887), par. 231, pp. 654–6; par. 232, pp. 661–4; Moore, *Digest*, VI (1906), par. 995, pp. 705–17; par. 996, pp. 718–20; par. 997, pp. 723–32; Hackworth, *Digest of International Law*, V (1943), pp. 610–14; Harvard Research in International Law, *State Responsibility*, *A.J.*, Suppl., 23 (1929), art. 8.

limited sphere.[1] In the *North American Dredging Co.* Case,[2] the majority of the American-Mexican Claims Commission adopted this view in the following words:

"Its [the clause's] purpose was to bind the claimant to be governed by the laws of Mexico and to use the remedies existing under such laws . . .; in executing the contract, in fulfilling the contract or in putting forth any claim regarding the interests or business connected with this contract the claimant should be governed by those laws and remedies which Mexico had provided for the protection of its own citizens. . . . He did agree that in consideration of the Government of Mexico awarding him the contract, he did not and would not invoke or accept the assistance of his Government with respect to the fulfilment and interpretation of the contract and the execution of the work thereunder."

According to this view the Calvo Clause is an integral part of the contract, not only in form, but also in substance.[3]

(*c*) *Expansion of the Calvo Clause.* On the other hand, the sphere of the Calvo Clause has been constantly enlarged and has been made to include "all interests and the business connected with this contract". As far as this provision is restricted to questions of a private law nature arising out of the original transaction it is unobjectionable, seeing that a previous submission, however wide, is admissible in most systems of private law, if it remains limited to the original parties and to the transaction concluded between them. Difficulties arise, however, if the claim is based upon the breach of a collateral obligation.[4] In the great majority of cases these difficulties have been confused with the question whether, by means of a Calvo Clause, parties can legitimately oust the jurisdiction of international courts and waive the rights accruing under international law to their Home State. This approach is not surprising, seeing that breaches of collateral obligations consist mainly of what in municipal law are termed tortious acts for which a corresponding remedy in international law is readily available in the form of a claim for denial of justice.

(*d*) *The Calvo Clause and Collateral Obligations.* In the course of this discussion the preliminary question has generally been overlooked whether the clause is ever meant to apply to breaches of collateral obligations resulting from acts extraneous to the contract (such as confiscations, illegal acts of officials) and for which the foreign State is directly or vicariously liable under international law. However, this aspect of the Calvo Clause has not

[1] *North and South American Construction Co.* v. *Chile*, Moore, *Internat. Arb.*, III, p. 2318, at p. 2320; *Beales, Nobles and Garrison*, Moore, *Internat. Arb.*, IV, p. 3548, at pp. 3554, 3562; *Nitrate Ry. Co. Ltd.* v. *Chile*, Ralston, I, no. 86, p. 67; *Flannagan, Bradley, Clark & Co.* Case, Moore, *Internat. Arb.*, IV, p. 3564, at p. 3565.

[2] *Opinions*, I, p. 21, at p. 27 (14); p. 28 (15). See also *Mexican Union Ry.* v. *Mexico*, *Decisions*, I, p. 157, at p. 164 (12); p. 171 (6), *per* Percival, British Commissioner, dissenting; *International Fisheries Co.* v. *Mexico*, *Opinions*, III, p. 206, at p. 213.

[3] *Mexican Union Ry.* Case, *Decisions*, I, pp. 157, 160 (8), (9); *Rogerio* v. *Brazil*, Ralston, I, no. 88, p. 69; *Rudloff* Case, *ibid.*, no. 77, p. 63; *Nitrate Ry. Co. Ltd.* v. *Chile*, *ibid.*, no. 86, p. 67; *Beales, Nobles and Garrison* Case, Moore, *Internat. Arb.*, IV, p. 3548, at p. 3562; *Flannagan, Bradley, Clark & Co.* v. *Venezuela*, *ibid.*, IV, p. 3564, at 3565; *Pitol* Case, Feller, pp. 196–9.

[4] In the *Mexican Union Ry.* Case, *Decisions*, I, p. 157, at p. 159 (6), the Commission denied that the clause, in its more extensive wording, raised any additional problems. But in *Douglas Collie McNeill* v. *Mexico*, *Decisions*, II, p. 21, at pp. 23 (5), 24 (5), the Commission refused to consider a clause which provided: ". . . The business will preserve its Mexican character and without rights of foreigners", on the ground that the precise right waived by the concessionnaire had not been properly specified.

been entirely neglected. In the *Interoceanic Ry. of Mexico* Case, Stoker, the British Commissioner, in a dissenting opinion, pointed out that, among the cases before the Mexican Claims Commission which had involved an examination of the Calvo Clause, only the *North American Dredging Co.* Case had been based upon a breach of contract, while all others had been concerned with damage to property caused by revolutionary activities. Commissioner Stoker said:

"the judgment of the present Commission in the *Mexican Union Ry. Case* . . . apply it [i.e. the principle in the *North American Dredging Co.* Case], in my opinion unnecessarily and irrelevantly, to the *Mexican Union Ry.* Case, as if that case were a case of alleged breaches of contract and not, as it was, a claim entirely distinct from the contract and one arising from revolutionary acts. The *Mexican Union Railway* Case has nothing to do with the position of the Mexican Union Railway as contractor and *qua* contract . . . it was merely incidental that they were contractors. . . . There was no question of contract or interpretation thereof, and the Mexican Union were not seeking to enforce a contract. . . . The claim of the Mexican Union Railway was brought by them not as contractors, nor as seeking any rights under their contract, but as British subjects carrying on business in Mexico who had suffered loss . . . through revolutionary causes. . . . It is entirely outside any contract, whether it contained or did not contain a Calvo Clause."[1]

In the great majority of cases, however, international tribunals have held implicitly that a contractual Calvo Clause extends to damage done to property belonging to an alien contractor or concessionary in respect of which redress is accorded by an action in tort in municipal law and, correspondingly, by a claim based on State responsibility, direct or indirect, in the sphere of international law.

The Calvo Clause and International Jurisdiction

With regard to the effect of the Calvo Clause in the international sphere, the opinion of international tribunals is divided, but its validity has been maintained in recent years. However, the reasons given by the tribunals do not always agree with each other.

(*a*) *Contractual Aspect.* Some tribunals have examined the contractual aspects of the Calvo Clause and whether it excludes from the jurisdiction of international courts all questions of a private law nature of which municipal courts normally take cognizance. The majority of the tribunals investigated whether and to what extent the clause is compatible with international law.

The contractual view found its clearest expression in the *Turnbull Case*,[2] a much-criticised decision,[3] in which Barge, the Umpire, said:

"These damages can, according to the contract itself, only be declared due

[1] *Decisions*, II, p. 118, at p. 132 (7), (8), and see the same Commissioner's dissenting opinion in *Veracruz* (*Mexico*) *Railways* v. *Mexico*, *ibid.*, II, p. 207, at p. 210. See also the dissenting opinion of Sir John Percival in the *Mexican Union Ry.* Case, *Decisions*, I, p. 157, at pp. 171 (6), 173 (11). And see *La Guaira Electric Light and Power Co.* v. *Venezuela*, Ralston, I, no. 83, p. 65; *American Electric and Manufacturing Co.* Case, Ralston, I, no. 78, p. 64; *Selwyn* Case, Ralston, I, no. 84, p. 65, at p. 66.

In *Douglas Collie McNeill* v. *Mexico*, *Decisons*, II, p. 21, at p. 24 (6), the tribunal rejected a plea to the jurisdiction set up by the respondent Government which relied on a Calvo Clause in a contract concluded between an alien contractor and the municipality of Colima (Mexico).

[2] Ralston, I, no. 80, p. 64, Moore, *Internat. Arb.*, VI, pp. 306–7.

[3] Moore, *loc. cit.*, pp. 306–7.

in case the expressly designated judges decide that the fact, which according to the demanding party constituted such a breach of contract, really constituted such a breach, and therefore formed a good basis whereon to build a claim for damages. Parties have deliberately contracted themselves out of any interpretation of the contract and out of any judgment about the ground for damages for reason of the contract, except by the judges [designated] by the contract; and where there is no decision of these judges that the alleged reasons for a claim for damages really exist as such, parties according to the contract itself have no right to these damages and a claim for damages which parties have no right to claim, cannot be accepted."

According to this view, the Calvo Clause refers to questions of procedure and of substance, and international tribunals are not only precluded from entertaining a claim based upon the original contract, before the local remedies have been exhausted, but from giving judgment on any question of a private law nature arising out of the contract. However, the arguments of the umpire in the *Turnbull* Case are inconclusive, seeing that they fail to explain why a contractual clause relating to private law claims can affect an international reclamation, and the consequences of the decision are open to serious criticism.[1] Nevertheless, the underlying idea to the effect that international claims for State Responsibility on the ground of damage done to property can only succeed if the existence of a property right in municipal law has first been proved is correct.[2] It is difficult, however, to accept the view of the Umpire who believed that the question of private law was necessarily subject to the jurisdiction of municipal courts, or that, in order to succeed in an international court, the same claim must have been allowed, and not dismissed, by a municipal court. It would appear that, in respect of claims involving State responsibility for denial of justice affecting property rights, international tribunals must themselves apply both municipal law and international law. Municipal law determines whether a property right has been acquired and whether it is vested in the claimant. International law must decide whether the defendant State is liable for the violation of a property right so acquired.[3]

With the exception of the tribunal in the *Turnbull* Case, however, international tribunals which have upheld the Calvo Clause in the international sphere on contractual grounds have only required that the local remedies must have been exhausted, but not that a judgment in favour of the claimant has been obtained in a local court. In support of this interpretation of the clause the tribunals have usually referred to the terms of the contract.[4] In

[1] Moore, *loc. cit.* Thus an international reclamation would only be permissible if the municipal court has given a judgment in favour of the claimant.

[2] See *Transactions of the Grotius Society*, 29 (1944), p. 51, at pp. 55, 56.

[3] *Transactions of the Grotius Society, loc. cit.*, at p. 61, and the cases quoted *ibid.*, at pp. 53–5 especially *Mexican Union Ry.* v. *Mexico, Decisions*, I, p. 157, at p. 162 (10); *North Amer,ican Dredging Co.* Case, *Opinions*, I, p. 21, at p. 27 (14); *International Fisheries Co.* Case, *Opinions*, III, p. 206, at pp. 241, 273 (*per* Nielsen, dissenting). See also Sobolewski in *Revue générale de droit international public*, 38 (1931), p. 420, at p. 434; Genet, *ibid.*, 36 (1929), p. 669, at pp. 692–3; Ténékidès in *Revue de droit international et de législation comparée*, 57 (1930), p. 473, at p. 478; Rundstein in *Hague Recueil*, 23 (1928), p. 331, at p. 437.

[4] *Orinoco S.S.* Case, Ralston, I, no. 79, p. 64; *Day* Case, *ibid.*, I, no. 73, p. 59; *Woodruff* Case, *ibid.*, I, no. 75, p. 62; *French Co. of Venezuelan Railroads* Case, *ibid.*, I, no. 111, p. 84; *Flannagan, Bradley, Clark & Co.* v. *Venezuela*, Moore, *Internat. Arb.*, IV, p. 3564, at p. 3565. And see *North and South American Construction Co.* v. *Chile*, Moore, *Internat. Arb.*, III, p. 2318.

Rogerio v. *Bolivia*[1] the Court refrained from accepting jurisdiction "because it is not proper to divide the unity of a juridical act, sustaining the efficacy of some of its clauses and the inefficacy of others." In the *Rudloff* Case[2] the same argument was expressed in a slightly modified form, when the tribunal stated that it was prohibited from giving the benefit of its jurisdiction "to a claim based on a contract by which this benefit was renounced and thus absolving [the] claimants from their obligation whilst the enforcing of the obligation of the other party based on the same contract is precisely the aim of their claim."

(*b*) *Compatibility with International Law.* However, even when relying on the contractual effect of the Calvo Clause, international tribunals have never entirely neglected to examine whether the Clause is compatible with international law. In recent times the latter aspect of the problem has become predominant. The decisions of the tribunals show clearly that two principles have been recognized without reservation. In the first place, denial of justice always constitutes a violation of international law, if an alien is involved, and entitles the State of the alien to bring an international reclamation on his behalf.[3] In the second place, no individual can renounce the protection of his State and waive rights accruing to the State under international law.[4]

In the light of these principles the tribunals have examined whether the Calvo Clause is compatible with international law. In the words of the Commission in the *North American Dredging Co.* Case:

> "What must be established is *not* that the Calvo Clause is universally accepted or universally recognized, but that there exists a generally accepted rule of international law condemning the Calvo Clause."[5]

The Calvo Clause is thus restricted to its contractual setting. The only opposition to this method of investigation has come from Commissioner Nielsen,[6] who asserted that it was necessary to establish not only that the Calvo Clause is compatible with international law, but that it has been adopted by the community of nations as a rule of international law proper. This approach is a natural consequence of the same Commissioner's conclusion, discussed above, to the effect that every breach of a contract on the part of a government automatically creates an international reclamation based on a violation of international law. In these circumstances it is necessary to prove the existence of a special, universally recognized rule of international

[1] Ralston, I, no. 88, p. 69.

[2] Ralston, I, no. 77, p. 63. See also *Mexican Union Ry.* v. *Mexico, Decisions*, I, p. 157, at p. 162 (9).

[3] *North and South American Construction Co.* v. *Chile*, Moore, *Internat. Arb.*, III, p. 2318, at p. 2320; *Beales, Nobles and Garrison* Case, Moore, *loc. cit.*, IV, p. 3548, at p. 3562. See also *Flannagan, Bradley, Clark & Co.* v. *Venezuela*, Moore, *loc. cit.*, IV, p. 3564, at pp. 3665–66; *Woodruff* Case, Ralston, I, no. 75, p. 62; *North American Dredging Co.* Case, *Opinions*, I, p. 21, at p. 27 (14); *International Fisheries Co.* Case, *Opinions*, III, p. 206, at p. 219; *Mexican Union Ry. Co.* Case, *Decisions*, I, p. 157, at pp. 164 (12), 171 (6); *Interoceanic Ry, of Mexico* Case, *Decisions*, II, p. 118, at p. 122; *El Oro Mining Co.* Case, *Decisions*, II, p. 141, at p. 149 (7).

[4] *Nitrate Ry. Co. Ltd.* v. *Chile*, Ralston, I, no. 86, p. 67; *Martini* Case, *ibid.*, no. 85, p. 66; *North American Dredging Co.* Case, *Opinions*, I, p. 21, at p. 25 (11); *Mexican Union Ry.* Case, *Decisions*, I, p. 157, at pp. 162 (10), 171 (6); *Interoceanic Ry. of Mexico* Case, *Decisions*, II, p. 118, at p. 122 (7).

[5] *Opinions*, I, p. 21, at p. 24 (8).

[6] *International Fisheries Co.* Case, *Opinions*, III, p. 206, at pp. 235, 254–5, 259–61.

law permitting the individual to waive this international claim before the Clause can be regarded as valid, seeing that, according to international law, individuals cannot normally waive international claims. Nielsen's treatment of the Calvo Clause stands and falls with his premise, which was refuted above.[1] His attempt to elevate the Calvo Clause itself into the sphere of international law, if only in order to expel it therefrom, has failed.

Courts of arbitration at the end of the nineteenth and the beginning of the present century were inclined to hold that the Calvo Clause cannot, in any circumstances, be set up as a defence against an international claim predicated on the ground of denial of justice.[2] However, the problem was given a new turn when the American-Mexican and the Anglo-American Mixed Claims Commissions were called upon to pronounce upon the validity of the Calvo Clause. These tribunals started from two premises, namely, first, that as a rule international claims in respect of breaches of contract can only be brought on the ground of denial of justice and after the local remedies have been exhausted and, secondly, that the Calvo Clause requires, similarly, that recourse must be had to the local courts.[3] Thus the contractual clause, being treated as identical with a condition imposed by international law, could be regarded as compatible with the latter.[4] Before commenting on the conclusion reached by these tribunals it may be useful to examine their premises.

In the first place, insufficient attention has been paid to the fact that claims for denial of justice in respect of breaches of contract on the part of a State do not necessarily require a previous exhaustion of local remedies. Denial of justice in the wider sense occurs not only if all local remedies have been exhausted or if no such remedies are provided. It also includes legislative and administrative measures for which a State is directly responsible. It is possible that the tribunals have failed to recognise this fact by reason of their tendency to treat contracts concluded between a State and an individual exclusively as acts *jure gestionis*, and all questions arising out of such contracts as disputes involving solely the application of municipal private law by municipal courts. Also, it may be due to the extension of the Calvo Clause to breaches of collateral obligations.

It is significant that the Anglo-Mexican and American-Mexican tribunals have never held a State to be directly responsible, even when the facts pointed to direct liability under international law, in spite of occasional statements that such liability was not excluded altogether.

In the second place, the Calvo Clause itself has been subjected to a very restricted interpretation. As shown above,[5] the contracting alien is made

[1] Pp. 134, 135.

[2] *North and South American Construction Co.* Case, Moore, *Internat. Arb.*, III, p. 2318, at pp. 2320–1; *Beales, Nobles and Garrison* Case, *ibid.*, IV, p. 3548, at p. 3562; *Flannagan, Bradley, Clark & Co.* v. *Venezuela*, *ibid.*, IV, p. 3564, at p. 3565; *Woodruff* Case, Ralston, I, no. 75, p. 62.

[3] *North American Dredging Co.* Case, *Opinions*, I, p. 21, at pp. 27 (15), 29 (20); *International Fisheries Co.* Case, *ibid.*, III, p. 206, at p. 218; *Interoceanic Ry. of Mexico* Case, *Decisions*, II, p. 118, at p. 122 (7); *El Oro Mining Co.* Case, *ibid.*, II, p. 141, at pp. 149 (7), 150 (9); *Mexican Union Ry.* Case, *ibid.*, I, p. 157, at p. 164 (12), (13).

[4] *Contra* Nielsen, dissenting, in *International Fisheries Co.* v. *Mexico*, *Opinions*, III, p. 206, at pp. 237 ff., citing, at p. 249 (IX), Commissioner Little, dissenting, in *Flannagan, Bradley, Clark & Co.'s* Case; and see pp. 251, 273. See also Sir John Percival, dissenting, in *Mexican Union Ry. Co.* v. *Mexico*, *Decisions*, I, p. 157, at p. 171 (6).

[5] P. 133 (*e*).

to waive the right to appeal for the protection of the Home State and is made to surrender all future rights under international law. The tribunals have held—rightly, it is believed—that a clause thus conceived is incompatible with international law. But instead of refusing to give effect to such a clause, the tribunals have reduced its compass and have attributed a meaning to it which the parties never intended. Only after this operation was it possible to reconcile the clause with the principle of international law. In other words, only by dint of over-emphasizing the importance, in the sphere of international law, of the principle that local remedies must be exhausted, and by reducing a far-reaching contractual provision to a simple submission to the jurisdiction of the courts of a particular State for the purpose of determining questions of private law proper, have international tribunals been able to maintain the validity of the Calvo Clause. Even if thus construed, the identity of the Calvo Clause with the principles of international law governing claims for denial of justice is more apparent than real. Submission to local jurisdiction under a Calvo Clause is a matter of procedure. The exhaustion of local remedies required by international law before a claim for denial of justice can be brought constitutes a material prerequisite of the claim and is thus a matter of substance.

Yet it may be doubted whether the effect of thus reconciling the Calvo Clause with the principles of international law justifies the labour of the tribunals concerned. If it is true that the exhaustion of local remedies is always required by international law before a claim for State responsibility in respect of breaches of contract can be brought, the insertion of a Calvo Clause in a contract is superfluous. If the exhaustion of local remedies is not always a necessary prerequisite according to international law, no contractual Calvo Clause can make it a prerequisite. Thus there is some substance in the statement of those tribunals which have held that the Calvo Clause is altogether ineffective in the international sphere.[1]

The Calvo Clause and Private Law Claims in International Courts

In recent years the tendency has grown among States to entrust international tribunals with the decision of questions of private law proper arising out of transactions between the defendant State and a national of the plaintiff State. The effect of the Calvo Clause on these reclamations is determined by the answer to the question whether they are international not only in form but also in substance.

There is a substantial measure of agreement that transactions of a private law nature concluded between a State and an alien are transactions governed by municipal law.[2] Also, it is generally accepted that, even in the absence

[1] Commissioner Little (dissenting) in *Flannagan, Bradley, Clark & Co.* v. *Venezuela*, Moore, *Internat. Arb.*, IV, p. 3564, at p. 3566; *Nitrate Ry. Co. Ltd.* v. *Chile*, Ralston, I, no. 86, p. 67; *Selwyn* Case, Ralston, I, no. 84, p. 65, at p. 66; *Coro and La Vela Ry. and Improvement Co.* Case, Ralston, I, no. 81, p. 65. And see above, p. 139, n. 4, p. 140, n. 2.

It is clear that municipal legislation embodying the Calvo Clause is equally ineffective, subject to the additional proviso that the contract must be governed by the law of the country adopting the clause. For an enumeration of such municipal legislation see Borchard, *Diplomatic Protection of Citizens Abroad* (1917), pp. 795–6, note 6, and Summers in *Revue de droit international*, 7 (1931), p. 567, at p. 568.

[2] Schwarzenberger in *Juridical Review*, 54 (1942), p. 25, at p. 27; Strupp in *Hague Recueil*, 8 (1923), p. 5, at p. 64; Rundstein in *Hague Recueil*, 23 (1928), p. 331, at p. 376, but see p. 402; Séfériadès in *Annuaire de l'institut de droit international*, 1929 (I), p. 505, at p. 525.

of an international claim based on a denial of justice, the States concerned may bring disputes arising out of such transactions before international tribunals by special agreement (e.g., under Art. 36 (1) of the Statute of the Permanent Court of International Justice), without previously exhausting the local remedies.[1] Confronted with disputes of this nature, the Permanent Court of International Justice in the *Serbian and Brazilian Loan* Cases[2] held, nevertheless, that these disputes were international in substance, and not only in form, that jurisdiction existed under Art. 36 (2) of the statute, and that in accordance with Art. 38, international law was applicable. The Court argued that every diplomatic dispute between two States in respect of a contract concluded between one of them and a national of the other was a legal dispute concerning "the existence of any fact which, if established, would constitute a breach of an international obligation".[3] Since it is clear that neither the formal existence of a diplomatic dispute nor the seizure of an international tribunal by two States acting in agreement is "a fact which would constitute a breach of an international obligation", it would appear that the Court treated a breach of contract on the part of a State as constituting automatically a breach of international law. As shown above, this view must be rejected as far as ordinary commercial contracts are concerned.[4] The fact that the dispute concerned public loans and not ordinary commercial contracts is of no decisive importance. Public loans are governed by municipal law, public or private,[5] and, like all other claims governed by municipal law, they give rise to international reclamations only after a denial of justice in the wider sense has occurred. However, a considerable body of opinion holds that such loans are governed exclusively by international law, but it is impossible to go into this question here.[6]

[1] Borchard in *Harvard Law Review*, 44 (1931), p. 1322; Watrin in *Revue de droit international*, 8 (1931), p. 161, at pp. 184, 185; Sobolewski in *Revue générale de droit international public*, 38 (1931), p. 420, at p. 435; Rundstein in *Revue de droit international et de législation comparée*, 56 (1929), p. 431, at pp. 440–1; Ténékidès, *ibid.*, 57 (1930), p. 473, at pp. 478–9; 59 (1932), p. 89, at pp. 95–7; Séfériadès in *Hague Recueil*, 51 (1935), p. 5, at p. 66; Mercier and De La Barra in *Annuaire de l'institut de droit international*, 1927 (II), p. 565, at p. 607; Strupp in *Hague Recueil*, 8 (1925), p. 9. *Contra*: Fischer Williams, *Chapters on Current International Law* (1929), p. 257, at p. 259; *Bibliotheca Visseriana*, II (1924), p. 1, at p. 3; *Hague Recueil*, 5 (1924), pp. 113–14 (only after denial of justice); similarly Rundstein in *Hague Recueil*, 23 (1928), p. 331, at pp. 344, 437, 453, but see pp. 406, 420; *Revue de droit international et de législation comparée*, 66 (1929), p. 431, at pp. 431–2, but see pp. 451–2, 761–3, 764–7, 771; Borchard in *A.J.*, 24 (1930), pp. 361–5.

[2] Ser. A, nos. 20, 21. See also *Illinois Central Railroad Co.* v. *Mexico, Opinions*, I, p. 15, at p. 17.

[3] Ser. A, no. 20, pp. 16–20; no. 21, p. 101. Similarly Séfériadès in *Hague Recueil*, 51 (1935), p. 5, at pp. 22, 102, but see p. 99; *Annuaire de l'institut de droit international*, 1929 (I), p. 505, at p. 547; Travers in *Clunet*, 52 (1925), p. 29, at p. 35; Rundstein in *Revue de droit international et de législation comparée*, 66 (1929), p. 431, at p. 433.

[4] *Supra*, pp. 134, 135; not quite clearly Lauterpacht in *Hague Recueil*, 62 (1937), p. 99, at pp. 223–6.

[5] For a good survey of the problem see Borchard in *Proceedings of the American Society of International Law* (1932), p. 135, at p. 148; see also Fischer Williams, *Chapters on Current International Law* (1929), pp. 346–7; *Bibliotheca Visseriana*, II (1924), p. 57; Meurer in *Zeitschrift für Völkerrecht*, 8 (1914), p. 1, at p. 21. And see *R. v. International Trustee for the Protection of Bondholders Aktiengesellschaft* [1937] A.C. 500.

[6] (*a*) Not directly a claim under international law: Moore, *Internat. Arb.*, IV, p. 3614, at pp. 3615, 3641; Hackworth, *Digest of International Law*, V (1943), p. 610, at pp. 623–4; *Bluntschli and Pflug*, cited by Borchard, *loc. cit.*; Schwarzenberger in *Juridical Review*, 54 (1942), p. 21, at p. 22; Nussbaum, *Money in the Law* (1939), pp. 387–91, citing Domke in *Clunet*, 63 (1936), p. 547; Schmitthoff in *Journal of Comparative Legislation*, 3rd ser., 19 (1937), p. 179; Note in *Yale Law Journal*, 46 (1937), p. 891; Jacoby in *A.J.*, 30 (1936), p. 233, at p.

Apparently the Permanent Court itself found it difficult to adhere to the sweeping view expressed earlier in the judgment and applied not international but municipal law on the basis of a system of Private International Law the nature of which has been discussed elsewhere.[1] The reluctance of the Court to admit that it was applying nothing but municipal law is understandable, for apart from raising a difficult question of principle, it touched upon serious problems of a practical nature, such as proof of foreign municipal law. On the other hand, there seems to be no reason why States should not entrust international courts with the decision of disputes involving questions of private law alone, and not merely incidentally as a preliminary question in the sense discussed above,[2] seeing that States are clearly at liberty to refer to any municipal court disputes turning upon questions of international law.

Nevertheless, the practice of States, as expressed in treaties concerning the protection and the settlement of claims arising from contracts and from State loans, has not fully realized that this course is open and has refrained from explicitly imposing upon international tribunals the duty to apply municipal law for the decision of these disputes. Article 1 of the Hague Convention (No. II) respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, of 18 October 1907, binds States not to have recourse to armed force for the recovery of contract debts, claimed from the government of one country by the government of another country as being due to its nationals, unless, *inter alia*, when the debtor State refuses or neglects to reply to an offer of arbitration. According to Article 2 the award under an arbitration, as envisaged in Article 1, "shall determine, except where otherwise agreed between the parties, *the validity of the claim, the amount of the debt, and the time and mode of payment* [italics mine].[3]

The wording of Article 2 suggests that the arbitration is to concern itself chiefly with questions of private law proper. This verbal interpretation is strengthened by the following juridical considerations. First, as stated above, international law contains no branch dealing with contracts. If a breach of contract is to form the basis of a claim based on international law, it must constitute a tortious act in the nature of a denial of justice. However, it is generally understood that claims for injuries done to resident aliens

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[*Note continued from previous page.*]

236; Strupp in *Hague Recueil*, 8 (1925), p. 5, at p. 64; Sobolewski in *Revue générale de droit international public*, 38 (1931), p. 420, at p. 435; Ténékidès in *Revue de droit international et de législation comparée*, 59 (1932), p. 89, at p. 98.

(*b*) Directly governed by international law: Moore, *Internat. Arb.*, IV, pp. 3631, 3649–50; Wuarin, *Essai sur les emprunts d'états* (1907), p. 35; Freund, *Rechtsverhältnisse der öffentlichen Anleihen* (1907), v. Liszt, cited by Borchard, *loc. cit.*; Watrin, *Revue de droit international*, 8 (1931), p. 161, at pp. 188–9; Séfériadès in *Hague Recueil*, 51 (1935), p. 5, at pp. 100, 102.

(*c*) Exceptional class, extra-legal, extra-national: Drago in *A.J.*, 1 (1907) at pp. 695–6; Fischer Williams in *Bibliotheca Visseriana*, II (1924), p. 1, no. 1; *Chapters*, p. 257, at p. 258, n. 3; Politis, *Les emprunts d'état en droit international* (1894), cited by Strupp, *loc. cit.*, p. 66, and the writers cited by Borchard, *loc. cit.*, pp. 144–5.

[1] *Transactions of the Grotius Society*, 29 (1944), pp. 51–83.

[2] P. 138.

[3] See also Art. 53 (2) of Convention I for the Pacific Settlement of International Disputes.

are not affected by the Convention.[1] Secondly, if the Convention envisaged claims for denial of justice connected with injuries to aliens and arising out of breaches of contract, the absence of the requirement that local remedies must be exhausted coupled with the obligation immediately to resort to arbitration would restrict the range of claims covered by the Convention. For thus only breaches of contract in consequence of legislation or of administrative acts which are not subject to review would be directly affected, while claims on the ground of non-performance of contracts would not fall within the compass of the Convention. That the text of the Convention was not so understood by the contracting parties appears clearly from the action of certain South American States which signed subject to the reservation that the local remedies must have been exhausted. These States were anxious to restrict the Convention to claims based on international law, although arising from contracts, while the other signatories were attempting to meet the case of contractual claims proper.

Where claims of a private law nature form the object of an international reclamation, the proceedings are international in form, but not in substance. Consequently, it is necessary to examine whether the conclusions reached above, to the effect that the Calvo Clause is ineffective where international reclamations based on international law are concerned, require any qualification where the claims are predicated on the basis of private law.

The problem presented itself to the American-Mexican and the Anglo-Mexican Claims Commissions in the following circumstances:

Article V of the American-Mexican Claims Convention of 8 September, 1923, provided "that no claim shall be disallowed or rejected . . . by the application of the general principle of international law that the legal remedies must be exhausted as a condition precedent to the validity or allowance of any claim".[2] Dealing with this article in the *North American Dredging Co.* Case[3] the American-Mexican Claims Commission held that it excluded the operation of the Calvo Clause where claims are presented on the ground of a breach of international law, but not where contractual claims are predicated on the basis of municipal law. The Commission said:

" If it (i.e. the claimant) had a claim for denial of justice, for delay of justice or gross injustice, or for any other violation of international law, committed by Mexico to its damage, it might have presented such a claim to its government which, in turn, could have espoused it and presented it here. But where a claimant has expressly agreed in writing . . . that in all matters pertaining to the execution, fulfilment and interpretation of the contract he will have resort to local tribunals and then wilfully ignores them by applying to his government, he will be bound by his contract. . . ."[4]

[1] Pearce Higgins, *Hague Peace Conferences* (1909), pp. 191–6; Fischer Williams in *Bibliotheca Visseriana*, II (1924), p. 1, at pp. 42, 44; *Chapters*, p. 257, at pp. 310, 313; Strupp in *Hague Recueil*, 8 (1925), p. 5, at pp. 100–1. The following reservations were made: (1) denial of justice must have occurred. Argentine, Salvador, Guatemala; (2) local remedies must have been exhausted: Columbia; (3) the contract must not fall under the jurisdiction of the ordinary courts: Peru, Uruguay; (4) unless the contract or local laws provide to the contrary: Greece, Bolivia.

[2] Art. VI of the Anglo-Mexican Convention of 19 Nov. 1926 was to the same effect.

[3] *Opinions*, I, p. 21, at pp. 29 (20), 31 (22); see also the majority opinion in the *Mexican Union Ry. Co.* Case, *Decisions*, I, p. 157, at pp. 163 (11), 164 (12). See also *Nitrate Ry. Co.* v. *Chile*, Ralston, I, no. 86, p. 67; *Rudloff* Case, Ralston, I, no. 77, p. 63.

[4] *Loc. cit.*, at pp. 29 (20), 31 (22) (23).

Since the claim was one of contract proper, the Commission applied the Calvo Clause and declined jurisdiction. Such claims could not be "rightfully presented" prior to the exhaustion of local remedies.

At first sight this argument may seem attractive. If the claim is predicated on grounds of private law and if, as shown above, the Calvo Clause is restricted to and applicable in the sphere of municipal law, it is difficult to escape the conclusion that effect must be given to its terms. Yet this conclusion is fallacious. The provisions of the Calvo Clause, as far as they concern submission to the jurisdiction of the contracting State, result in the absence of jurisdiction on the part of the courts of all other States.[1] They do not and cannot invalidate an agreement between the contracting State and the State of the contracting alien establishing the jurisdiction of an international tribunal for the decision of private law disputes arising out of a contract.[2] The jurisdictional provisions of the Calvo Clause are a matter of procedure, and not of substance.

Conclusions

(1) In the sphere of municipal courts administering municipal law the Calvo Clause is a legitimate expression of the liberty to contract accorded to the parties. It embodies a choice of the law governing the contract, submission to the jurisdiction of the contracting State, and an acknowledgment that recourse to the State of which the alien contractor is a national is inadmissible for the purpose of pressing a contractual claim.

(2) Before international tribunals the Calvo Clause is ineffective.

(*a*) In so far as international law requires the exhaustion of local remedies before a claim predicated upon State responsibility can be brought, the Calvo Clause is superfluous. Where the exhaustion of local remedies is not required by international law, no contractual Calvo Clause can supplement the law of nations.

(*b*) If, in virtue of an agreement between States, international tribunals are given jurisdiction to entertain claims alleged to be based on municipal law, the provisions of the treaty conferring jurisdiction must prevail over those of the contract which deny it.

[1] See above, p. 134.

[2] *Martini* Case, Ralston, I, no. 85, p. 66; *Selwyn* Case, *ibid.*, I, no. 84, p. 65, at p. 66; *Robert Stirling* Case, Ralston, I, no. 86, p. 68; *Antofagasta and Bolivia Ry. Co.* Case, Ralston, I, no. 86, p. 68; Nielsen (dissenting) in *International Fisheries Co.* v. *Mexico, Opinions*, III, p. 206, at p. 247. See also Ténékidès in *Revue générale de droit international public*, 43 (1936), p. 270, at pp. 281–3.

INTERNATIONAL LAW AND THE CONTROVERSY CONCERNING THE WORD "LAW"

By GLANVILLE L. WILLIAMS, Ph.D.
Reader in English Law in the University of London

In this paper it is proposed to examine what is perhaps the largest of jurisprudential controversies, namely, that as to the word "law". An attempt will be made to show that it is a verbal dispute, and nothing else. It requires perhaps some temerity to suggest that a discussion carried on over many generations has been wholly unreal. However, this is the thesis of the present article. It seems fitting that the question should be ventilated in this Year Book, for international lawyers, though acting largely in self-defence, bear some part of the responsibility for perpetuating the dispute now to be examined, and many of them are still inclined to continue it.

I

The amount of printed matter on the meaning of the word "law" is enormous. Thurman Arnold rightly says that any attempt to define this word leads us into a maze of metaphysical literature, perhaps larger than has ever surrounded any other symbol in the history of the world.[1] For English readers, however, it is not necessary to go back farther than the writings of Austin, because the dispute did not reach serious proportions in England until his time.

It is unnecessary to repeat here Austin's theory at any length, and the only feature of it to which attention need here be called is his effort to arrive at the "proper" meaning of the word "law". At the outset of his lectures on jurisprudence he set himself to frame a definition of law, the subject of his study, that would effectively exclude the various rules observed by men in society that are not regarded by municipal lawyers as law. Austin correctly saw that the distinguishing feature of municipal law as opposed to social observance is that law is, in general, enforced upon the members of the community by the organized might of the community. This feature, accordingly, he seized on for his definition of law. Every law properly so called, he said, is a general command, and is subject to an evil in case of disobedience. This does not fit all municipal law; but it is not a bad general description. Unfortunately, when Austin came to define municipal law (which he called "positive law", and which he thought of as a species of "law properly so-called"), he thought it necessary to embody also in the definition the theory of sovereignty. Austin made a minor mistake in thus assuming the existence of Austinian sovereigns all over the world; and moreover his work did not include the close analysis of legal relations that was later to be made by jurists like Hohfeld. But speaking generally, Austin's insistence upon the test of enforcement was a perfectly sound point, so long as he was speaking of municipal law. His major mistake, and the cause of most of the subsequent trouble, was his assumption that because the test

[1] *The Symbols of Government* (1935), 216.

of enforcement satisfied the municipal lawyer (or, at least, the lawyer who was interested in municipal *private* law, as opposed to constitutional law), therefore it was a touchstone of the "validity" of any and every application of the term "law".[1] Acting on this assumption he constructed a complete table of the uses, "proper" and "improper", of the term "law". The table is well known, and it is enough to recapitulate Austin's statement of "law improperly so called". This comprises (*a*) "laws by analogy", i.e. rules of conduct imposed by the general opinion of an indeterminate body, such as the laws of fashion and of honour, the custom of wearing black at funerals, and (we may add) the conventions of the constitution, and (*b*) laws by metaphor, e.g., such scientific uniformities as the law of gravity, and also the laws of a game like bridge, and the laws of art.

Austin's theory has given rise to two main controversies: first, whether he has hit upon a satisfactory test of *municipal* law (which was what he was primarily trying to do), and second, whether he was "right" in saying that what he called "law by analogy" and "law by metaphor" are not "properly" called "law". It is unnecessary to say any more about the first question; as to the second, it is my purpose to show that this question is purely a verbal one, although few of the parties to the controversy seem to have realized it.

The storm-centre was the department of "laws by analogy". Lawyers were not likely to quarrel with Austin's exclusion from "law properly so called" of such matters as the uniformities of nature; but "laws by analogy" were on a very different footing. This rubric included, in particular, early customary law and international law, for these were not commanded by a determinate person. Consequently they were, according to Austin, outside the pale of "law properly so called".[2]

Now it was not *necessary* for Austin's exposition to assert that early customary law and international law were not "properly" called law. It was enough for him to say that he did not intend to include them within the term "law" *for his purpose*—i.e. that he did not intend to draw upon them in fashioning the subject of jurisprudence as he proposed to teach it. But instead of saying this he asserted that these bodies of rules were not "properly" called law, and in so doing he gravely offended some jurists who were interested in these subjects, and had always thought of them as law.

It is or should be clear to us to-day that in thus attempting to dogmatize on the "proper" meaning of a word Austin was mistaking the function of words. The word "law" is simply a symbol for an idea. This idea may vary

[1] Austin was not the first to assert this. Hobbes had declared that "law properly is the word of him that by right hath command over others", and he was followed by Bentham, who suggested a doubt "with what degree of propriety rules [of international law] can come under the appellation of *laws*": *Principles of Morals and Legislation*, 1789 ed., ch. X. ix. § 25 (Bowring's ed. i. 150), 1823 ed., ch. XVII. § 25; *cp.* Bentham's *General View, &c.*, ch. IV (Bowring's ed., iii. 162).

[2] "Laws by analogy" might also include, in some countries, parts of constitutional law. In so far as constitutional law is law relating to the sovereign power it cannot, according to Austin, be "law properly so called", because in his view the sovereign cannot confer legal rights or impose legal duties upon himself. For Austin, a sovereign who purports to confer legal rights upon himself is in fact not altering the law but simply exercising the *de facto* powers of a sovereign; and a sovereign who purports to impose legal duties upon himself is in fact not altering the law but simply announcing a rule that he will regard as morally binding. No opposition to this part of Austin's theory came from English constitutional lawyers, because in England the legal sovereign is Parliament, and English law does not even *appear* to provide Parliament with rights and duties.

with the person who uses the word. Austin defined what the word meant for him, which he was entitled to do, but he was not entitled to adopt a legislative attitude and declare what the word should mean for other people. The power that Austin assumed for himself, to define the meaning of the words he used, he should have accorded also to others. Every one is entitled for his own part to use words in any meaning he pleases; there is no such thing as an intrinsically "proper" or "improper" meaning of a word. The nearest approach to the "proper" meaning is the "usual" meaning;[1] and certainly it is generally desirable to keep to usual meanings, and a person who uses a word in an unusual meaning must state clearly the meaning in which he is using it, on pain of being misunderstood if he does not. But Austin was not seeking the usual meaning of the term "law". If he had been, he could hardly have denied that the phrases "law of nations" and "law of gravity" were usual ones, and moreover phrases that were usual among the best writers.

Austin's opponents could, therefore, have challenged him on the simple and unassailable ground that he was assuming a power that no man possessed: the power of dictating to others the meanings in which they should use words. But not all of them did this. Instead, some tried to answer the fool according to his folly by contending that other bodies of rules than those recognized by Austin were law "properly" so called.

It is convenient to start with the objections raised by the historical jurists. They were interested in early customary law, and this Austin's "command" theory did not fit. Austin had himself demonstrated that it did not fit,[2] so there was no dispute about this. Some of the historians, however, thought that by failing to give a definition of "law" that would embrace early customary law Austin had made a deep philosophical error in his conception of law. They regarded "law properly so called" as a broad idea, of which municipal law and early customary law were but particular applications. They asserted that in his "command" theory of law Austin had failed to make a correct analysis of this idea. So he had, if it be assumed that the term "law" is to be read as widely as the historians contended. Austin, however, was not concerned to modify his "command" theory of law, in order to bring in early customary law, because, for him, customary law was not law "properly" so called. This could be no more than an assertion of personal preference in the use of words, upon which (if these historians had but seen it) scientific argument was not possible.

This criticism of certain of the historians, that they shared Austin's error as to the function of words, cannot be urged against Maine. His treatment, of Austin, in Lectures XII and XIII of his *Early History of Institutions* (1875), is moderately worded, and he attempts little more than to show (what Austin did not deny) that early communities governed by customary law knew no Austinian "sovereign". Upon Austin's contention that until

[1] A form of the usual meaning is the etymological meaning—i.e. the usual meaning of the word (or of roots from which it is derived) in times past. It may offend our aethetic susceptibilities if a word is used in such a way as to show ignorance of its origin. But Austin was not speaking of etymology or of aesthetics.

For a further discussion of "proper" meanings and the process of definition, see Williams, "Language and the Law", *Law Quarterly Review*, 61 (1945), pp. 71 ff.

[2] *Lectures on Jurisprudence*, 5th ed., i. 101–2, 199–200; ii. 536–43.

customs are enforced by courts of justice they are merely "positive morality", but that, as soon as courts of justice enforce them, they become commands of the sovereign, and therefore law, Maine discerningly remarked that this was "a mere artifice of speech". He also pointed out that "nobody is at liberty to censure men or communities of men for using words in any sense they please, or with as many meanings as they please, but the duty of the scientific enquirer is to distinguish the meanings of an important word from one another, to select the meanings appropriate to his own purposes, and consistently to employ the word during his investigations in this sense and no other."[1]

It is regrettable to have to take Sir Frederick Pollock as the first representative of the type of objection to Austin that is here being criticised. In an article published in 1872, Pollock wrote of Austin's definition: "It will be my aim to show that this definition, if exclusively insisted on, errs by elevating what is at most one characteristic of law into its essence; that contrariwise, by losing sight of what is really an essential constituent, it narrows the proper scope of law and tends to an unsatisfactory view of its operation; and that by putting forward the arbitrary and suppressing the necessary aspect of legislation it seriously obscures the organic relation of law to the community."[2] It is submitted that the question what is the "essence" of law is not one to be debated as though it were a question of fact. "Essence" simply means "important feature", and what is important is a subjective or emotional matter. It is, in short, a matter of taste, and, as the old saw expresses it, *de gustibus non est disputandum.* Also, it is difficult to understand the remark that Austin's definition of law "tends to an unsatisfactory view of its [i.e. the law's] operation", for the whole question is what is the "law" that we are talking about, and it is not easy to see how a definition of what we are talking about can tend to an unsatisfactory view of what we are talking about.

Pollock went on to picture the typical Indian village community as seen by an imaginary observer imbued with Austin's theory. He declared: "Not one of the conditions required by the conception of law which the [Austinian] inquirer brought with him is satisfied; yet it is impossible to say that in such a society there is no law without giving an entirely wrong impression." That is to say, without giving an entirely wrong impression to a listener *unacquainted with Austin's definition of law.* But this is simply an elaborate way of asserting that the limitation put by Austin upon the meaning of the word "law" is an unusual one; it is not, and cannot be, a factual refutation of Austin's definition. A statement that this primitive society was not governed by law *in the Austinian sense of the word* would be a true statement, and would not be misleading to a person who knew the Austinian theory.

At the time of this article Pollock was still a young man, but he repeated the substance of his view later in his *First Book of Jurisprudence,*[3] where he

[1] Maine's writings have become somewhat misunderstood through their treatment in later books, e.g. in Wise and Winfield's *Outlines of Jurisprudence.* Maine is represented as having criticized Austin, whereas he gave him warm praise. Maine simply said that Austin's definitions did not fit early law, and acknowledged that they were not intended to do so.

[2] "Law and Command", (1872) 1 *Law Magazine and Review,* 3rd Ser. 189 at 191.

[3] 6th ed. (1929), pp. 23–4.

declared that the Austinian view was "hard to reconcile with the witness of history". Bryce kept him company by asserting that the imperative theory was "untrue as a matter of history".[1] The theme was also taken up and embroidered by Clark in his book called (and very improperly so called!) *Practical Jurisprudence*, published in 1883. About a hundred pages of this book were devoted to the derivation of the word "law" and of certain corresponding words in other languages. Summarizing his own work, Clark wrote: "In the unconscious definitions of law furnished by those early names for it, which I have been examining . . . the nearest approximation to a uniform or pervading idea is certainly not so much that of *enactment*, *position* and *command*, as of *antiquity*, *general approval* and *usage*: where an original notion of *ordinance* does appear, it is not human but divine" (p. 90). The study certainly throws an interesting light upon the primitive attitude to law—i.e. to early customary law—and indicates the psychological conditions that helped it to secure obedience. But Clark seems to have thought that his work did something more than this, viz., refute Austin. At page 94 he says: "I have been mainly occupied in shewing that the original conception of law, in several very important instances, by no means agrees with the fundamental part of his [Austin's] definition". To this we may reply for Austin that he was not interested in the original conception of what Clark chose to call "law", and that in fact he (Austin) chose not to call this original conception "law". Etymological meanings are no more than the usual meanings of words in past ages, and Austin did not regard himself bound by usual meanings whether belonging to the past or to the present.[2]

In the next hundred pages of his book, Clark examined multitudinous definitions of law framed by philosophers and lawyers. This initiated in England the sterile discussion of definitions of the word "law" that has done so much to discredit jurisprudence. Clark, like Austin, seemed to think that there was a proper definition of the word "law", but he disagreed with Austin as to what that definition was, and he thought that he could vindicate his opinion by examining the definitions given by others. He did not seem to realize that this process could only indicate the usual meaning of the word "law" and could not prevent Austin from using it in an unusually restricted meaning.

Clark also followed Pollock in supposing that he could disprove Austin by reference to the facts of history. Thus at page 154 he declared that there is a "fact to be observed in the case of the Indian village communities, and which bears in a very direct manner upon Austin's definition of law. These small bodies have from time immemorial been under successive conquerors or their descendants, despotically ruling vast tracts of country. They cannot, therefore, to anticipate a little, be called *independent states*; and Austin would logically deny them the name of *political society* at all. But it would be mere perverseness, for want of 'position' by a sovereign, internal or external, to deny the name of law to the rules which have regulated the conduct of

[1] *Studies in History and Jurisprudence* (1901), ii. 44; cp. *ibid.* 249.

[2] Three other writers to inject etymology into jurisprudence were T. E. Walker (*The Science of International Law*, 1893, pp. 21–5), W. G. Miller (*Data of Jurisprudence*, 1903), and Salmond (*Jurisprudence*, 7th ed. 1924, App. I). Salmond's statement of his purpose in doing so is moderately worded and hardly open to objection, but Walker, like Clark, evidently thought that his study provided a refutation of Austin.

their members for so long, and which no prince, however despotic, could conceivably to the Indian mind have altered." Austin's reply to this could have been that no fact to be observed in the case of the Indian village communities could bear upon his definition of law, for the simple reason that he had excluded the custom of the Indian village communities from his definition of law.[1] I do not quite know what Austin would have said to the charge of "perverseness", but we at any rate can make his defence for him. In the classic words of Humpty Dumpty, "The question is which is to be master—that's all."[2]

In the course of time a new champion of Austin's attitude towards early customary law emerged in the person of Salmond. Salmond directed himself against the proposition of Pollock and Bryce that law cannot be the creature of the State, because it existed before the State. His answer is well known. "If there are any rules prior to, and independent of the State, they may greatly resemble law; they may be the primeval substitutes for law; they may be the historical source from which law is developed and proceeds; but they are not themselves law. [There may have been a time in the far past when a man was not distinguishable from the anthropoid ape, but that is no reason for now defining a man in such manner as to include an ape.]"[3] The validity of this argument depends upon what it was intended to convey. If Salmond meant that arbitrary lines have to be drawn in the application of words, that he himself intended to use the word "law" to mean only modern municipal law, and that it was no objection to his usage that modern municipal law had grown out of early customary law, then his argument was perfectly sound. But if Salmond meant that the word "law" has some one intrinsically-proper meaning which can be discovered by the use of reason and in particular by examining the analogies of other word-meanings, such as the meaning of "man", then his argument was palpably false. To take Salmond's own illustration, the student of prehistory is wasting his time if he gets involved in an argument whether the word "man" may properly be applied to any particular creature that comes in the line of Adam's ancestors. All that matters is how many resemblances this creature bears to modern man, and what are the points of difference. If anthropologists discover enough about *Pithecanthropus erectus* ("Java man") to be able to affirm that in most respects he was more like modern man than he was like the common ancestor of man and ape, they have made a contribution to knowledge. But if, in consequence, they decide to confer the label "man" upon *Pithecanthropus erectus*, they add nothing to our knowledge. Their decision will be of importance only in the selection and arrangement of their own particular subject matter; and it certainly will not mean that you or I, when we speak of "man", will necessarily intend to include in the meaning of that term such a creature as *Pithecanthropus erectus*.

It is the same with early customary law. By all means let us examine the characteristics of early customary law, and compare and contrast it

[1] Holland, indeed, tried to support Austin by arguing that the custom of the village communities might in some circumstances fall within Austin's definition (*Jurisprudence*, 13th ed. (1924), 53–4). But whether it did or did not could not affect Austin's definition as a definition of what Austin meant by law.

[2] Lewis Carroll, *Alice through the Looking-Glass*, Ch. 6.

[3] *Jurisprudence*, 7th ed. (1924), p. 51.

with modern law. But let us not argue about the propriety of calling it "law". If we dispute about the latter we shall not (whatever we think) be discussing the nature of law, but shall simply be arguing about each other's peculiarities of expression.

In fairness to Salmond it must be added that, put in its setting, his remark about early custom not being law is logically defensible, though misleading to the youthful student for whom his book was designed. The setting just referred to was as follows. Salmond began his book by enumerating a number of kinds of law (in the wide sense), including the uniformities of nature and international law, and made upon them the following very sensible observation. "Any discussion as to the rightful claims of any of those classes of rules to be called laws—any attempt to distinguish laws properly so called from laws improperly so called—would seem to be nothing more than a purposeless dispute about words. Our business is to recognize that they are in fact called laws, and to distinguish accurately between the different classes of rules that are thus known by the same name" (p. 20). Then at page 33 he came to the subject of municipal law, which he preferred to call "civil law", and announced that "in the absence of any indication in the context of a different intention, the term law, when used *simpliciter*, means civil law and nothing else, and in this sense the term is used in future throughout this book." Thus when, later in the book, Salmond declared, in the words already quoted, that "if there are any rules prior to, and independent of the state . . . they are not themselves law", he must have meant by the last word, in accordance with his own previous statement, civil (i.e. State) law and nothing else. So read, his proposition that there is no (State) law independent of the State becomes a tautology. It is simply a restatement of his own definition in a negative form. This may be misleading to the ordinary student, who has probably been led to suppose that Salmond is advancing a factual proposition as to the so-called "nature" of law.

It may be asserted that there *was* a significant issue between Austin and the historians, namely, an issue as to the "central feature" of "law", and that the issue was whether this "central feature" was the force of the governor, or the consent of the governed. Put in this way the question does sound as though it is a factual one. But the difficulty is that a question so formulated cannot be significantly debated unless the debaters agree upon the meaning (i.e. the referent) of the word "law". This the Austinians and such of the historians as debated the issue stubbornly refused to do. Had they come to a working agreement upon the meaning of the word "law" for the purpose of their debate, they would instantly have discovered that there was practically nothing left for them to debate, for there were no facts in issue between them. The most they could have debated would have been whether this or that feature of an agreed referent of "law" was "central". But this debate again would have lacked a factual character, for "central" in this context is simply a synonym for "important", and what is "important" is a subjective matter. Importance lies in the eye of the beholder. No operation can be performed to test whether one feature of a referent is more important than the others, nor is such an operation conceivable. To debate what is important and what

unimportant is, therefore, to enter upon a controversy that can never be settled.

So much for the legal historians. Turning now to the international lawyers, some of them were even more disturbed by Austin than were the historians. It seemed to these writers that if Austin's theory were accepted it would rock their subject to its foundations. They were not at all of the opinion that international law by any other name would smell as sweet; on the contrary, they assumed, quite rightly, that if it ceased to go by the name of law it would lose caste among the governments that were supposed to respect it. Difficult as was their task in persuading the Chancelleries of the world to obey the rules they formulated, it would be even more difficult if they once admitted that what they wrote was no more than "positive morality". Thus in their discussion of the meaning of "law" these international lawyers had an axe to grind. They saw that the word "law" is not only a symbol for a reference; it also evokes a powerful emotional response. The word "law" stimulates in us the attitude of blind obedience that we have come through our upbringing to associate with the idea of municipal law. Change the word for some other and the magic was gone.[1] Accordingly these writers felt obliged to embark upon the unprofitable discussion as to the "proper" meaning of the term "law".

The foregoing statement of the position taken by some international lawyers does not apply to all. Some even swallowed Austin's terminology and conceded that international law was not properly called law, or at any rate was not called law in the strict sense of the word.[2] Others, less docile but still restrained and moderate, pointed out that Austin had no authority to act the law-giver in regard to the meanings of words. Thus W. Oke Manning, in his *Commentaries on the Law of Nations*, published in 1839, seven years after Austin's *Province of Jurisprudence Determined*, sagely observed: "My objection is that the word *law*, which has, in our language, so long been employed in a much wider sense, should, by a single writer, be declared to be only 'properly' used with this restricted meaning" (p. 5). Pollock, in the article already quoted, wittily pointed out the incongruous

[1] Clark recognized the importance to international law of catching the emotional associations of the word "law" when he wrote: "Who does not know the damning effect of a popular nickname or epigram? The glibly repeated definition, that denies to International Law the name of *law* at all, must of necessity cast a certain slur upon the principles which still go by that name" (*Practical Jurisprudence*, 187). So also Walker, *The Science of International Law* (1893) 35: "To refuse any rule the mere name of Law, on whatever ground, would be, in the popular mind, to deprive it of all that peculiar halo of respectful reverence which has undoubtedly attached to the term in the passing of the ages." Timasheff, *Introduction to the Sociology of Law* (1939) 254: "The word 'law', 'statute', 'court' and a thousand others have gradually become stimuli of submission."

[2] Wheaton, *International Law*, 8th ed. (1866), 18–19, quotes Austin with approval. In Halleck's *International Law*, 1st ed. (1861), 51–2, it is said that "these rules cannot, perhaps, with strict propriety be called laws, in the sense of commands . . ., but . . . they are . . . properly termed *laws*." This is either badly expressed or self-contradictory. Maine, *International Law*, 2nd ed. (1894) (lectures delivered in 1887), 49, thought that Austin's views on international law were "very interesting and quite innocuous", adding: "It is very convenient, when the main subject of thought is positive law, that we should remember that International Law has but slender connection with it, and that it has less analogy to the laws which are the commands of sovereigns than to rules of conduct, which, whatever be their origin, are to a very great extent enforced by the disapprobation which attends their neglect." Writers on jurisprudence who followed Austin's view of international law were Gray, *Nature and Sources of Law*, 2nd ed. (1921), 130; Holland, *Jurisprudence*, 13th ed. (1924), 133; cp. Holland, *Lectures on International Law* (1933), 6.

results of Austin's definition by observing: "If we are not to be allowed to give the name of law to the Declaration of Paris, for instance, we may console ourselves if we choose by giving it to an ultimatum addressed, say, by Monaco to Russia." This was legitimate argument as to the desirable use of words, not open to objection so long as it was not disguised as an argument on a point of fact. Hall's treatment of the subject may be regarded as open to objection on the latter score, for after conceding "an element of truth" to Austin's view, he observed: "It is now fully recognized that the proper scope of the term law transcends the limits of the more perfect examples of law."[1] This is unobjectionable if it means merely that the word "law" is not limited in its ordinary usage to municipal law, but then Austin had never denied the fact. One rather feels that Hall in this and later sentences joined Austin in the search for objective proper meanings other than usual meanings, and if so he laid himself open to the same charge as Austin.

In 1884 Lawrence published a paper entitled "Is there a true International Law?"[2] He summed up the matter very neatly by saying that "everything depends upon the definition of law which we choose to adopt. The controversy is really a logomachy—a dispute about words, not things" (p. 29). Yet one cannot help feeling that Lawrence himself did not realize the full import of his assertion. Had he done so, he would have made the assertion earlier in his paper, and have rested his case upon that point alone. In that event he might have damped down the controversy. As it was, he succumbed to the temptation of producing arguments against Austin, and thus poured oil instead of water upon the flames. One of his arguments was that there are other motives of obedience to municipal law besides force (e.g., religion, superstition, morality, self-interest, lethargy); also, municipal law would break down if every rule had to be enforced. These are true propositions of fact, but they cannot be used to prove or disprove a definition.

Objection also attaches to part of Walker's discussion in his *Science of International Law* (1893). Walker began excellently by pointing out that though Austin was free to limit his treatment to some alone of those rules that commonly go by the name "laws", he was not free to play the dictator as to the use of words by other people (p. 8). Walker also pointed out that the ordinary meaning of the word "law" was wider than Austin's. Had he stopped there he would have earned nothing but applause. But then, with an excess of enthusiasm for his subject, he went on to copy the historians by appealing to history and philology, arguing that Austin could be confuted by "the hard facts of history" and "the history of words". As I have said before, and am prepared to repeat *ad nauseam*, neither of these can in logic destroy a definition.

In a later paper Pollock argued that the difficulty or impossibility of enforcing a rule of international law is no objection to regarding international law as having a "legal" character, because "in the early history of all jurisdictions the executive power at the disposal of the courts has been rudimentary, if indeed they had such power at all".[3] This is another attempt to prove a definition by reference to the facts of history.

[1] *International Law*, 4th ed. (1895), 14–15.

[2] *Some Disputed Questions in Modern International Law* (1884), 1.

[3] "The Sources of International Law" (1902) 2 *Columbia Law Review* 511 at 514–15, reprinted in Dickinson, *The Law of Nations* (1929), 36.

The question was again taken up by J. B. Scott in an article entitled "The Legal Nature of International Law".[1] Two of his arguments were as follows: (1) It is no objection to the legal nature of international law that it is unenforceable, because certain duties imposed by municipal law upon the superior organs of government in a state are equally unenforceable. The conclusion follows from the premise, but the premise assumes a particular definition of "law". If one were to deny this definition, asserting (as Austin did[2]) that the duties imposed upon a government are only quasi-legal, one could logically deny the conclusion. (2) International law is law because it is part of the law of every State. Here the premise is not quite true,[3] and even if wholly true it would not yield the conclusion that international law is a law binding States towards each other.

Coming to more modern times, Keith,[4] in a discussion of Austin's definition, remarks that it "has no general validity"—as if a definition can be valid for any purpose except the purpose of the person who advances it.

It is not only the English who concern themselves with the pseudo-problem of the legal character of international law. Professor Lauterpacht[5] summarizes the view of several Continental writers (Bergbohm, Bluntschli, Heilborn, Fauchille, De Louter, Strupp, Walz) who argue that international law is law notwithstanding the absence of compulsory jurisdiction in international courts, for the reason that as a matter of history law preceded the establishment of tribunals. Professor Lauterpacht's comment on this theory is that "it assumes the existence of law in communities in which, on its own showing, such existence may legitimately be the object of controversy". While respectfully agreeing with the substance of this comment I should like to alter its wording, for to speak of the theory as being concerned with "the existence of law" may lead the unwary reader to believe that a question of fact is involved, when all that is involved is the application of words. I should therefore prefer to say that the theory seeks to prove the "validity" of a particular application of a word by the artifice of using the same word in a similar way in another context. In fact no proof of the "validity" of a linguistic usage is necessary or possible.

Modern international lawyers who enter the lists in the controversy usually do so by trying to frame a definition of "law" that will include international law. A favourite definition is that of Westlake,[6] tying the idea of law to that of society or community. Every society, according to this school of thought, necessarily has a system of law. Beginning with this formula, all that is necessary to prove that international law exists is to prove that an international society exists. But of course this again is a verbal question, depending upon one's definition of the word "society", which is so vague in its ordinary meaning that one can give it any twist one pleases. Westlake was quite certain that an international society existed;

[1] (1907) 1 *American Journal of International Law*, 831,

[2] *Lectures*, 5th ed., i. 288.

[3] See Lauterpacht, "Is International Law part of the Law of England?" (1939) 25 *Transactions of the Grotius Society*, 51.

[4] In his edition of Wheaton, *International Law*, 6th ed., i. 6.

[5] *The Function of Law in the International Community* (1933), 424. For a further bibliography of Continental literature see Charles Rousseau, *Principes Généraux du Droit International Public* (1944), i. 6–7.

[6] *Collected Papers* (1914), chap. 1.

Professor Goodhart, who is a recent recruit to this theory, is not so confident.[1] Consequently Professor Goodhart is still not sure whether international law is properly named or not.

One rather remarkable turn taken by the controversy is the way in which some writers seize upon the institution of war to prove the legal character of international law. It might have been thought that war is, to say the least of it, a blemish in international relations. But instead of describing it as a blemish, some writers introduce it into the discussion almost with an appearance of relief, as constituting the legal sanction behind international law and so as proving its "legal" character. Thus Jhering, having postulated the element of coercion in his definition of law, found that he could save the "legal" character of international law only by arguing that it was maintained by unorganized force, i.e. by war.[2] Other distinguished writers taking the same line are Sidgwick, Scott, Oppenheim, and Sir John Fischer Williams.[3] So also Westlake distinguished a moral from a legal international claim as one that States "do not feel justified in supporting with the last degree of pressure".[4] This last definition is extremely difficult to apply, and from the emotional point of view it is bad because it makes legality depend upon bellicosity. There is no need to dwell on other objections to war as a sanction, such as the fact that it involves the innocent as well as the guilty, and that it avails only when might happens to coincide with right. Nor need we stop to consider the difficulty in the way of the theory resulting from the fact that customary international law appears to draw no distinction between a sanctioning and an aggressive war. It may, however, be pointed out that, quite apart from all these difficulties, the supposed analogy to municipal law does not hold, because a rule would not be regarded as part of municipal law merely because it was supported by a threat of unorganized enforcement, e.g., revolution, or even organized but non-State enforcement, e.g., strikes and boycotts. Enforcement in municipal law means enforcement through a fixed social mechanism, and nobody pretends that that exists on the international plane.

Recently some international lawyers, perceiving the disastrous consequences of the unorganized enforcement of international law, and feeling strongly that international law should be strengthened on the municipal model, have taken to arguing that international law as it now stands does not deserve the name "law".[5] The sentiment is admirable, but to express

[1] "The Nature of International Law", (1936) 22 *Trans. Grot. Soc.* 31. Cp. Zimmern, "The Decline of International Standards" (1938) 17 *International Affairs* 1; Schwarzenberger, "The Rule of Law and the Disintegration of International Society" (1939) 33 *American Journal of International Law* 56; Brierly, *The Outlook for International Law* (1944), 4–5. Dr. Schwarzenberger carries the matter of nomenclature into yet more refined realms, distinguishing between community law and society law and saying that international law is the second but not the first.

[2] *Der Zweck im Recht*, tr. under title *Law as a Means to an End* (1913) 242 ff.

[3] Sidgwick, *Elements of Politics*, 4th ed. 286–7; Scott, *op. cit.* at 863–4; Oppenheim, *International Law*, 5th ed., i. 13; Fischer Williams, *Aspects of Modern International Law*, (1939), 92. Cp. the criticism of Salmond, *Jurisprudence*, 7th ed. 559.

[4] *Collected Papers*, 2–3, 7, 12–13.

[5] Thus C. Van Vollenhoven: "A servile science of jurisprudence, *ancilla potestatis*, instead of directing attention all the time to the shortcomings of a 'law' possessing no sanctions or guarantees, and instead of cleaving to a man like Grotius who had the courage to face up to the truth, contracted the habit of pleading that a law of peace which is continually ignored was none the less a 'law' of spotless character and beyond reproach; what is more, these

it in this particular way is simply to conceal the value-judgment involved and to invite verbal opposition.

Another recent discussion of the effect of war upon the "legal" character of international law is that of Kelsen.[1] He opens with the words: "Are the rules called international law to be regarded as 'law' in the same sense as those norms that are considered 'law' *par excellence*, the rules of national law? The answer to this question depends upon how one defines the concept of law." Kelsen proceeds to argue that the essential feature of national law is that it reserves all force to the community, so that all forcible interference in the sphere of interests of one subject to the order must be regarded as either a delict or a sanction. (Incidentally, it may be observed that this definition fails to apply to well-known municipal systems, like English law. English law recognizes the use of force in several ways that are neither delict nor sanction, such as the control of infants and lunatics, self-defence, and imprisonment without trial under Regulation 18b during the late war. In dictatorial states the sphere of "extra-legal" force that is neither delict nor sanction is even greater.) The learned jurist then inquires whether early customary law at the stage of the blood feud comes within his definition, and concludes that it does, for the reason that in primitive law the person who exercises self-help (the blood feud) is authorized to do so by law, and thus acts as an organ of the community (p. 49). With respect, this begs the question. Arguing in part from this analogy, Kelsen feels himself able to conclude that international law is truly law. The existence of war as an institution is in his opinion no difficulty, because all war is (even apart from treaty) either a delict or a sanction. Kelsen admits (p. 52) that it may be impossible in a concrete case to decide whether a given war by a given State is a delict or a sanction; but he does not regard this as affecting his theory. Also, he admits that it cannot be proved that in customary international law all war is a delict or a sanction; as he disarmingly says, he postulates this only because he wishes to reach the conclusion that international law is law according to his premise (p. 54).

It will be noticed that the learned author's construction, even if the argument be regarded as flawless, depends upon the characteristics initially selected as essential to national law. Had Kelsen regarded enforcement through a fixed social mechanism as essential to national law, his conclusion both for early custom and for international law must have been different. It is all a question of definition. Yet Kelsen seems to assume that his own definition of law is the only possible one, for he declares that anyone who denies the *bellum justum* theory must also deny that international law is true

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[*Note continued from previous page.*]

scholars adopted the tactics of concealing from themselves the dangers of that situation": *The Law of Peace* (1936), 135–6. "To acquiesce in the permanent absence [of the objective ascertainment of the rights by the courts] is to strain its legal character to the breaking-point": Lauterpacht, *The Function of Law in the International Community*, 426. "It is of the essence of the dignity of legal science—including the science of international law—to resist the temptation to lower the standard of law to the low level of an avowedly rudimentary practice": *ibid.* 434. "The conclusion seems inescapable that positive international law, so-called, has no claim to the name of law": Zimmern, (1938) 17 *International Affairs* 12. See also Lundstedt, *Superstition or Rationality in Action for Peace?* (1925) 561 ff.

[1] *Law and Peace in International Relations* (1942).

law (p. 54). Thus, like Austin, he tries to force his own definition of "law" upon all other users of the word.

It may be wondered why Kelsen thought this dialectic worth while. The answer that he gives is that the question is not merely theoretical, "for if international law is law in the same sense as national law, if the international community of states is, in principle, the same social phenomenon as the national community of individuals, it may be presumed that international law is susceptible to the same evolution as national law" (p. 29). With all respect, such a presumption cannot be inferred merely from a definition. If one is prophesying the future of international law one has to look at a great many factors besides the assumed essential features of municipal and international law.

II

It will be seen from the foregoing account that the error as to the "proper" meaning of words and as to "true" definitions is still widespread. For this there seem to be several reasons. For convenience of discussion they will here be considered in separate numbered sections, though to prevent possible misunderstanding it must be premised that some of the sections are simply different aspects of each other.

(1) The first misconception is the idea that a controversy as to concepts is not a verbal but a scientific controversy. Thus Professor Lauterpacht quotes Somló as denying that international law partakes of the character of law, while maintaining that this is not merely a matter of teminology, "for [Somló] says, if we describe the rules of so-called international law as rules of law we thereby obscure the conception of law as generally used."[1] Before considering this, let us get clear what we mean by a concept or conception. A concept is simply a universal notion (such as *space*, *time*, *causality*, *bird*, *law*) symbolized by a word. "Investigating (or analysing) concepts" means exactly the same thing as defining the corresponding words. Now when Somló refers to "the conception of law as generally used" he evidently means by the word "law" municipal law. But this is only one use of the word; there is also its use to symbolize international law, which has many affinities to municipal law. It is easy to construct a concept that will cover both municipal and international law. Why should we not symbolize this concept by the word "law"? Somló objects; he wishes to confine the term "law" to municipal law. But this is a mere matter of terminology, a fact that Somló expressly refuses to admit.

(2) The second reason for the misunderstanding considered in this paper is our tendency to conceal by our language the difference between a verbal and a scientific (factual) question. Four words that tend to conceal this difference are the copula "to be", "exist", "nature", and "theory".

As to the first, a sentence beginning "Law is . . ." may seem to state a fact; but it can practically always be translated by the words "The word 'law' means . . .", when it clearly introduces a definition. The only case where this translation is not permissible is where the word "law" is independently defined.

[1] Lauterpacht, *The Function of Law in the International Community*, 403, quoting Somló, *Juristische Grundlehre*, 2nd ed. (1927), 153–73.

Then, as to the word "exist", consider its use in the proposition: "International law does not exist". This may mean two different things: (i) that states do not observe any rules in their mutual dealings, or (ii) that, although states observe rules in their mutual dealings, these rules are not to be given the name "law". The first assertion is a factual one; it can be verified or disproved by looking at the conduct of States. The second is purely verbal. Yet both assertions alike can be expressed by reference to the "existence" of international law. This word "existence" seems to refer to a matter of fact, and may well in some contexts mislead the reader into thinking that a mere definition of terms is a scientific proposition.[1]

Again, an inquiry into the "nature" of a concept like "law" is simply a search for a definition of a word. But the word "nature" seems to refer to a matter of empirical fact, and is therefore misleading.

The fourth offender is the word "theory". A scientific theory is an attempt to express facts in words or other symbols. But a "theory of law" or "legal theory" is not a statement of fact; it is a definition of words, or a value-judgment as to what the law ought to be or do, or both.

(3) The third reason is our tendency to conceal the difference between a verbal question and a question of value-judgment. No one would be awarded a doctorate for asserting that in his opinion a State ought to rest on the consent of its subjects. Yet if he writes a book asserting that a State *is* an association resting on the consent of its subjects, academic honours may well follow. What is in truth a value-judgment is disguised as a definition of terms, and the definition of terms is itself erroneously regarded by the academic world as a scientific investigation.[2]

(4) The fourth reason is our tendency to hypostatize (objectify) abstractions. We take a word like "bird" or "law" and assume that somewhere in the universe there must be some entity corresponding to the word, an investigation into which is just as scientific and factual as the dissection of an individual sparrow in a laboratory. We assume, further, that our definition of the word must be an "accurate" word-picture of this "thing" in the universe to which the word belongs. It is this idea that causes us to speak so frequently of "true" definitions. As soon as we realize that *bird* and *law* are simply mental abstractions from the raw material of the universe, and that they do not exist by themselves separately anywhere, we realize that the idea of a true definition is a superstition. A description of an individual bird now before us, or of an agreed legal system, may be true or untrue, because we can verify it by reference to the facts; but a definition of "bird" or "law" cannot be true or untrue, because we do not start with

[1] Again to prevent misundertanding it may be pointed out that there is a sense in which a definition is a statement of fact. A definition may be understood as stating the way in which the speaker chooses to use words, and the way in which one chooses to use words is a fact. Nevertheless a definition is not a proposition about a datum: it is a proposition which is itself a datum.

[2] The result of this technique may be surprising, as T. H. Green discovered when he found himself obliged by his own terminology to affirm that Czarist Russia could be counted as a State only "by a sort of courtesy" (*Lectures on the Principles of Political Obligation*, 1927 reprint, 137). A similar difficulty is experienced with definitions of law, advanced by theorists like Duguit and Krabbe, which link it with natural law, "social solidarity", the "sense of right", or such-like. The consequence is that any particular rule that happens to be unjust, or anti-social, has to be denied the name "law", even though it be enforced by the tribunals of a State.

any facts by which it can be checked. A definition can indeed be true in the sense that it is a representation of the ordinary meaning of the word: but the use of the adjective "true" in this context is so likely to cause misconception that it is better to avoid it.

Philosophers of the so-called "realist" school have a great deal to answer for in this matter, for it is they who have stuck so stubbornly to the idea of the "reality" of universals, and consequently to the idea of "true" definitions and "true" meaning. Writing in the volume entitled *Modern Theories of Law*,[1] Professor C. A. W. Manning says: " 'What is philosophy?' is doubtless a philosophical question: for amongst other things philosophy concerns itself with the true meaning of terms." Perhaps the learned writer will agree that if this means anything it must mean that philosophy concerns itself with the ordinary meaning of terms, or with suggested new meanings, or both. There is no other possibility. This is not to disparage philosophy, for much useful work can be done in investigating the ordinary meanings of words (e.g., the functions of the copula), and making suggestions for improvement. What is true for philosophy is true for more specialized investigations of a kindred nature, such as analytical jurisprudence. The point to insist on is that such studies must start from words as they are actually used; it is unhelpful to frame definitions *a priori* and immediately to proceed to pronounce them "true" or "proper".

(5) Arising out of the proper-meaning fallacy is the idea that words have not only a proper meaning but a single proper meaning. This involves a denial of the fact that words change their meanings from one context to another. To illustrate the difficulties into which this idea lands one: we commonly speak of "early customary law", yet a municipal lawyer refuses to say that all social customs at the present day are law. Conventions of the constitution, for instance, are not usually called "law" by the modern lawyer. Now it is a fact that it is practically impossible to frame a definition of "law" in general terms that will *both* include early customary law *and* exclude modern conventions of the constitution. If it includes the one it will include the other, and if it excludes the one it will exclude the other. This leads the single-proper-meaning theorists to argue among themselves whether conventions are to be put in or early custom to be left out. Again the misconception comes from supposing that there is an entity suspended somewhere in the universe called "law", which cannot truthfully be described as both including custom and excluding custom. When we get rid of the entity idea and realize that we are defining words, we see also that there is no need to use words consistently. The word "law" has one meaning in relation to early customary law and a different meaning in relation to municipal law.[2]

[1] (1933), p. 184.

[2] A recent illustration of this error is Dr. Timasheff's *Introduction to the Sociology of Law* (1939). Dr. Timasheff first advances what he calls a "working hypothesis" of what law is, and then proceeds to try to "prove" this "hypothesis" by reference to the "facts". He does not perceive that his "hypothesis" is a definition and that a definition can neither be proved nor refuted. Thus he is led to challenge Malinowski's definition of law (advanced in a discussion of primitive law), arguing that it does not "work" as applied to later societies because it would turn rules regulating duels into legal rules (p. 277; reprinted in Hall, *Readings in Jurisprudence* (1938), 871). The error is well pointed out by Kantorowicz in (1940) 56 *L.Q.R.*, 115.

(6) Closely connected with the last misconception is the idea that there are natural differences of "kind" quite independent of human classification. Thus Leslie Stephen, in a discussion of Austin, asks whether the fact that Austin's "laws improperly so called" do not conform to his definition of law "corresponds to a vital difference in their real nature. Is he simply saying, 'I do not call them laws', or really pointing out an essential and relevant difference of 'kind'?" And again: "The question then arises whether the distinction between laws and customs is essential or superficial—a real distinction of kinds or only important in classification."[1] This language is misleading because it overlooks the fact that the concept of kind results from the process of classification, and that all classification is a man-made affair. An inquiry into whether a given difference is one of kind or of degree is a verbal, not a scientific inquiry.

(7) This error as to the existence of natural kinds is again closely connected with, if not simply an aspect of, the error as to the existence of natural essences. The latter error consists in the idea that the search for "essences" or "fundamental features" is in some way a factual investigation, and not merely an inquiry into the meaning of words. Enough has been said in general opposition to this idea, but it may be useful to examine in detail certain contentions of an influential text-book on logic by Cohen and Nagel.[2] The deserved esteem of this book makes the views expressed in it worthy of serious consideration.

After pointing out that disputes over definitions are frequently the result of a conflict of emotional attitudes, the authors go on to say:

"However, issues other than emotional ones may also be involved. Religion, for example, has sometimes been defined in terms of some dogma, sometimes in terms of a social organisation and ritual, and sometimes in terms of emotional experiences. The resulting conflicts over the meaning or essence of religion have been regarded, perhaps not without some justice, as conflicts over words. But this is only a half-truth. For the disputants frequently have their eye on a concrete phenomenon which presents all these aspects. The quarrels over the right definition of religion are attempts to locate the fundamental features of a social phenomenon. For if those features are taken as the definition of religion, it is possible to deduce many important consequences from it. Thus if belief in some doctrine is the essence of religion, other things follow than if some type of emotional experience is taken as defininig religion: in the one case there is an emphasis upon intellectual discipline and conformity, in the other, an emphasis upon aesthetic elements and a neglect of theology."

It is submitted that "attempts to locate the fundamental features of a social phenomenon" are attempts at definition, not scientific observation. Therefore the proposition in which these words appear does not advance the authors' argument that the conflict over the meaning of religion is over something other than words and emotion. Also, it is difficult to understand what "consequences" can be deduced from definitions, other than consequences as to the use of words. The authors say that if belief in some doctrine is regarded as the essence of religion, the "consequence" will be an emphasis upon intellectual discipline and conformity. But this is in effect

[1] *The English Utilitarians* (1900), iii. 322, 324.
[2] *Introduction to Logic and Scientific Method*, 2nd ed. (1943), 233.

a tautology, for it simply means that those who desire to see religion maintained, and who think that religion involves fixed tenets, necessarily desire to see these tenets maintained. The "consequence" follows not simply from the idea that religion involves fixed tenets, but from that idea plus the desire to see religion maintained; and the consequence is only a consequence in the logical sense, being in fact contained already in the premises. To put this in another way, the fact that a particular sect in real life insists upon intellectual discipline is not the effect of a definition of the word "religion". On the contrary, the word "religion" is merely a symbol for the practices of such a sect.

Cohen and Nagel proceed:

> "The age-long dispute about the nature of law involves similar issues. Is 'law' to be construed as a command, as a principle certified by reason, or as an agreement? The controversy is not simply about words. It is concerned with making one rather than another aspect of law central, so that the appropriate consequences may be drawn from it. A schoolroom illustration is the question, 'Is a bat a bird?' The two parties to the dispute concerning the answer may agree that a bird is a warm-blooded vertebrate having its fore limbs modified as wings, and yet not agree as to whether a bat is a bird. Why? Because one party to the dispute may believe there is a closer affinity of the bat to rodents than to birds, and may wish to regard those common features of rodents as central to the bat."

This, again, is difficult to follow. The "schoolroom illustration" seems to be plainly a dispute over verbal classification (as Locke held[1]) and thus to prove the opposite of what the authors contend. We are given the fact that there is no dispute over any of the features of the bat; so what is the dispute about if it be not over the application of words? It is difficult to see what is meant by "making one rather than another aspect of law central" unless the phrase have reference to the application of words. Those who construe law as command refuse to apply the *word* law to any system of rules that cannot be regarded as a command. Those who construe law as a principle certified by reason refuse to apply the *word* law to any system of rules that cannot be regarded as certified by reason. And so on. In each case the controversy is simply as to the application of a word, not as to the characteristics of any particular system of rules under dispute.

The answer to the argument that "consequences" can be drawn from the definition of "law" is the same as before: such consequences are only consequences as to the use of words. For instance, if "law" be construed as a command, the consequence will be that international law will not be called "law"; but this will not in itself wipe out the body of rules that are now accepted for determining the conduct of States. It is true that if the phrase "international law" be replaced in current usage by some such phrase as "international custom", these international rules may lose some of the respect in which they are now held. But this consequence will not follow merely from the definition of law as a command. It will follow from the fact that the word "law" is nowadays more highly charged with a certain kind of emotion (namely, the emotion of unquestioning obedience) than the word "custom".

[1] *Essay Concerning the Human Understanding* (1690), 13. 9. 15–16, 3. 11. 6–7.

Must these quarrels over definitions last for ever? They will unless we bring ourselves to realize that definitions have no importance of themselves, no importance apart from the ascertainment of meaning. The only intelligent way to deal with a verbal question like that concerning the definition of the word "law" is to give up thinking and arguing about it. By no other means can the controversy be brought to an end.

However, when jurisprudence comes to shake itself free from verbal controversies, there will still be some questions, hitherto discussed in connection with verbal ones, that may usefully be saved for discussion on their own account. Thus a comparison of international law with municipal law would be a factual, not a verbal, discussion. Again, one may usefully hold debate over the reasons why men observe rules; how far rules are observed; the reasons for non-observance; how far a particular rule-system is adequate to the needs of society; and how its sanctions can be improved. Any of these matters may be discussed in its own right; but to discuss it as incident to the question whether a system of rules is properly called law is to consign the issue to sterility.

DE FACTO RECOGNITION, WITHDRAWAL OF RECOGNITION, AND CONDITIONAL RECOGNITION

By PROFESSOR H. LAUTERPACHT

Whewell Professor of International Law in the University of Cambridge

I. De facto *Recognition*

Recognition de facto *as a Legal Act.* The subject of *de facto* recognition is a somewhat elusive topic of the law of recognition. There is no consensus of opinion as to its precise legal meaning. There are some who doubt whether, in law, it is at all distinguishable from *de jure* recognition. They regard it as a political nuance of the latter.[1] Some identify it with tacit recognition; others see its distinguishing feature in the circumstance that it results in an international capacity more limited than that following upon *de jure* recognition; others regard it as conditional, or provisional, or both; others consider its essential feature to lie in its revocability; others reduce its effect to the absence of ordinary, or complete, diplomatic intercourse.

We cannot hope to do justice to the question of *de facto* recognition unless we bear in mind: (*a*) that it is not a modern innovation but a frequent feature of the practice of States in the last century and a half; (*b*) that, far from constituting a mere diplomatic device of no other than political significance, it is a formal act the legal consequences and characteristics of which clearly distinguish it from recognition *de jure*; (*c*) that it must not be confused with informal intercourse, even when accompanied by an exchange of agents and representatives, not amounting to and not intended as recognition. For all these reasons, which will be here considered in some detail, *de facto* recognition has a distinct place in the law of recognition and must be treated as such. In particular it must be remembered that both *de facto* and *de jure* recognition are legal acts. They are convenient abbreviations for "recognition as a *de facto* Government (or State)" and "recognition as a *de jure* Government (or State)"—"*de facto*" and "*de jure*" being, in this connection, terms expressive not of any judgment upon the legitimacy of the recognized authority from the point of view of the constitutional law of the State concerned, but upon its claim to be considered as validly and effectively representing the State or territory in question in the field of international law. It is possible that the customary and convenient abbreviation—recognition *de jure* and recognition *de facto*—has been responsible for obscuring the legal nature of *de facto* recognition and for relegating the distinction between *de jure* and *de facto* recognition to the province of politics. In so far as recognition is of interest for international law it must be an act intended or calculated to give rise to legal rights and obligations. This applies to both "*de jure*" and "*de facto*" recognition.[2]

[1] Anzilotti, *Corso di diritto internazionale* (1927) p. 156; Knubben, *Die Subjekte des Völkerrechts* (1928), p. 340; Cavaglieri, *Corso di diritto internazionale* (1934), p. 203; Erich in *Hague Academy, Recueil des Cours*, 13 (1926) (iii), p. 486; Fischer Williams, *ibid.*, 44 (1933) (ii), pp. 261, 262; Redslob in *Revue de droit international* (Paris), XIII (1934), p. 438; Briggs in *American Journal of International Law* (cited here as *A.J.*), 33 (1939), p. 690. And see below, p. 173, n. 1.

[2] See, to the same effect, Verdross in *Strupp's Wörterbuch*, vol. I, p. 51, and in *Verfassung der Völkerrechtsgemeinschaft* (1926), p. 140; Fedozzi, *Trattato di diritto internazionale*, vol. I

The Practice of States and de facto *Recognition.* The exigencies of international life, especially those relating to the different aspects of recognition, do not admit of simple and categorical solutions. It is tempting to invoke formal logic and to say: A State or a government or a belligerent either does exist or does not; *tertium non datur*.[1] Such logic may or may not be deceptive. But the practice of States does admit of legally relevant degrees of recognition.

The beginnings of *de facto* recognition may be traced back to the first quarter of the nineteenth century when the secession of the Latin-American Republics confronted Great Britain and other States with the problem of reconciling the practical necessity of recognition with the legitimist pretensions of Spain and Portugal. The solution was found in a measure of *de facto* recognition, the distinguishing feature of which was that it did not purport to express an attitude with regard to the legal merits of the claim to independence and of the title of the parent State. Canning, his predecessors, and his immediate successors, spoke of recognition *de facto* in this sense.[2] It is with reference to *de facto* recognition thus conceived that Phillimore asserts that the "virtual and *de facto* Recognition of a new State gives no just cause of offence to the old State, inasmuch as it decides nothing concerning the asserted rights of the latter".[3] He identifies *de facto* recogni-

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[*Note continued from previous page.*]
(1933), p. 194; Brierly, *The Law of Nations* (3rd ed., 1942), p. 107; McNair, *Legal Effects of War* (2nd ed., 1944), p. 353, n. 1; Redslob in *Revue de droit international*, 13 (1934), p. 438.

[1] For an uncompromising rejection of *de facto* recognition see Dr. Baty's remarks in *Yale Law Journal*, XXXI (1921–2), p. 470. He says: "Recognition, when it occurs, must be unqualified and complete. Either the organization in question is a state or it is not. If it is a state, it is as a full-fledged state that it must be recognized—if it is not a state, it cannot be recognized at all. International law knows of no chrysalis states. Similarly, if it is a question of recognizing a new government, it cannot be recognized except as such. If it has not completely displaced the old government, it ought not to be recognized at all. If it has completely displaced it, then it constitutes a government on an equal footing with every other."

[2] See, e.g., a Memorandum, approved in 1822 by the British Cabinet, in which a clear distinction was drawn between three kinds of recognition in relation to the Latin-American Republics:

"1st. The Recognition, *de facto*, which now substantially subsists;
"2nd. The more formal Recognition by diplomatic agents;
"3rd. The Recognition, *de jure*, which professes to decide upon the title and thereby to create a certain impediment to the assertion of the rights of the former occupant."

The view was expressed that while there was no doubt that the first kind of recognition had already been granted, there was no occasion to commit Great Britain as to the third. The question to be decided was how far the second kind of recognition was to be granted. (Earl Bathurst to the Duke of Wellington, 14 September, 1822: Webster, *Britain and the Independence of Latin-America*, 1812–1830 (1938), vol. II, p. 71.) For another example of dialectical skill on the same lines see Wellington's *Observations* on a circular despatch sent in 1824 to British representatives abroad and printed in Webster, vol. II, p. 141, n. 1. See also Canning's speech of 14 June 1824, printed in *The Speeches of the Right Honourable George Canning* (ed. by Therry, 1830), vol. I, pp. 294–302. He spoke of the extent of the commerce between Great Britain and the Spanish colonies which led to "another *de facto* recognition of their separate political existence", namely, the recognition of their commercial flag. Yet a learned writer has spoken of "*de facto* States" as "a phenomenon of this illogical twentieth century" and as a "bastard institution" of recent times: Baty in *A.J.*, XXX (1936), p. 378.

[3] *Commentaries upon International Law* (3rd ed., 1879–88), vol. II, p. 23. Wiesse, *Le droit international appliqué aux guerres civiles* (1898), p. 237, sees the distinguishing feature of *de facto* recognition in the circumstance that it does not imply the affirmation of the legitimacy of the new government from the point of view of the constitutional law of the State concerned. Recognition, he says, means merely that the government is the actual repository of authority and that it possesses the means to make it effective.

tion with virtual recognition, e.g., with the recognition of the commercial flag and the appointment of consuls to the new State.

In the further course of the nineteenth century, while frequent reference is made to "*de facto* governments", there appear to be no clear instances of *de facto* recognition. Repeated pronouncements of the Government of the United States use the expression "*de facto* governments", but only in order to emphasize the practice of the United States to grant full recognition to "*de facto* governments" once they have been firmly established in accordance with the will of the nation.[1] In the words of the instructions sent in 1829 by Mr. Van Buren, Secretary of State: "So far as we are concerned, that which is the Government *de facto* is equally so *de jure*."[2] Pending such recognition it was the general practice to maintain unofficial relations, for the protection of nationals and otherwise. But these did not amount to and were not intended as recognition. It was only in the first and second decades of the twentieth century that there took place the adoption, especially by the United States, of the practice of *de facto* recognition conceived as formal though provisional recognition of an authority actually in power but not considered to fulfil all conditions of recognition because of doubts as to its permanency or for other reasons. In the case of Panama the United States formally granted recognition *de facto* on 6 November 1903, within three days of the Panamanian declaration of independence. Full recognition was granted a week later.[3] Probably the circumstances surrounding this event preclude it from being regarded as an instructive precedent. This cannot be said of the formal recognition of the revolutionary government of General Carranza by the United States and other States on 19 October 1915. On that day the United States, acting in concert with a number of American Republics, "extended recognition to the *de facto* Government of Mexico", of which General Carranza was the Chief Executive.[4] The recognition was preceded by elaborate and exhaustive investigation and by consultation between the United States, Brazil, Chile, Argentina, Bolivia, Uruguay and Guatemala. The representatives of those Governments, acting in Conference, found that "the Carrancista party is the only party possessing the essentials for recognition as the *de facto* government of Mexico".[5] In December 1915, Great Britain, after consultation with the United States, recognized the Mexican Government *de facto*[6]—a step which, in that period, never reached the stage of recognition *de jure*.[7] The *de facto* recognition granted by the United States was accompanied by an intimation that the latter was willing to receive and to accredit diplomatic representatives. It was not until two years later that full *de jure* recognition was granted.[8]

The events which accompanied the rise of a number of new States after the First World War and the uncertainty as to their future position and

[1] For some instances see Moore, *International Law Digest*, I, pp. 142, 148, 156.
[2] *Ibid.*, p. 137. [3] *Ibid.*, V, p. 55. [4] *U.S. For. Rel.*, 1915, p. 771.
[5] Hackworth, *Digest of International Law*, vol. I, p. 260. For an account of the circumstances preceding the recognition, see Finch in *A.J.*, 10 (1916), 357–67. See also *Annual Register*, 1915, 347. In *Oetjen* v. *Central Leather Company* the Supreme Court took "judicial note of the fact that . . . the Government of the United States recognized the Government of Carranza as the *de facto* government of the Republic of Mexico on October 19, 1915, and as the *de jure* government on August 31, 1917": (1921) U.S. 246, 301.
[6] See statements in the House of Commons on 2 and 8 November 1915: *Hansard*, vol. 75, cols. 482 and 1042. [7] See below, p. 176. [8] *U.S. For. Rel.*, 1917, pp. 938, 943.

territorial extent gave a new impetus to the practice of recognition *de facto*. The Governments of the new States which established themselves within the territories of the Austro-Hungarian monarchy and of Russia were in the first instance recognized *de facto*. The majority of them—Poland, Czechoslovakia, and the Baltic States—were subsequently recognized *de jure*. With regard to others—such as Armenia, Georgia, and Asarbejan[1]—recognition *de facto* never matured into recognition *de jure* for the reason that the inhabitants of those territories did not succeed in establishing themselves as independent States.[2] The provisional character of recognition *de facto* is shown by a survey of the British instruments of *de facto* recognition in that period. In the case of *The Gagara* the British Government informed the court that it had "for the time being provisionally, and with all necessary reservations as to the future, recognized the Esthonian National Council as a *de facto* independent body, and accordingly has received a certain gentleman as the informal representative of the provisional Government." It was added that "the state of affairs is of necessity provisional and transitory".[3] With regard to Latvia the British Government announced on 11 November 1918, that "His Majesty's Government has expressed its readiness to grant provisional recognition to the Lettish National Council as a *de facto* government until such time as the Peace Conference comes to a decision in regard to the future of Lettland. In the meantime His Majesty's Government has agreed to receive Mr. Meierovics as the informal diplomatic representative in Great Britain of the Lettish Provisional Government".[4] On 24 September 1919

[1] In January 1920 the Supreme Council of the Allied Powers decided that the Governments of those States should be recognized as *de facto* Governments on condition that that step in no way prejudged the question of their eventual frontiers: *U.S. For. Rel.*, 1920, vol. III, pp. 775–8.

[2] In a communication of the United States Department of State it was stated, in January 1934, that "the recognition which the United States accorded in 1920 to the '*de facto* Government of the Armenian Republic' is no longer effective since the Armenian Republic has ceased to exist as an independent State": Hackworth, vol. I, p. 222. In the unratified Treaty of Peace of Sèvres Turkey recognized Armenia *de jure*: Martens, *N.R.G.*, XX, p. 664.

[3] [1919] P. 95. The recognition *de facto* was expressed in the following letter to the Esthonian representatives of 3 May 1918:

> "I have the honour to acknowledge the receipt of your letter enclosing a memorandum on the political situation of Esthonia, and asking for recognition from His Majesty's Government.
>
> "It gave me much pleasure to receive your recent visit, and I take this opportunity of assuring you that His Majesty's Government greet with sympathy the aspirations of the Esthonian people and are glad to reaffirm their readiness to grant provisional recognition to the Esthonian National Council as a *de facto* independent body, until the peace conference takes place, when the future status of Esthonia ought to be settled so far as possible in accordance with the wishes of the population. It would obviously be impossible for His Majesty's Government at the present time to guarantee to Esthonia the right to participate at the peace conference, but at any such conference His Majesty's Government will do their utmost to secure that the above principle is applied in Esthonia.
>
> "In the meantime His Majesty's Government will be glad to receive Professor Antonius Piip as the informal diplomatic representative of the Esthonian provisional government": *U.S. For. Rel.*, 1918, *Russia*, vol. II, p. 829.

At the same time Esthonia was informed of the French decision "à reconnâitre provisoirement le Conseil national Esthonien comme une organisation indépendante de fait jusqu'à ce que la Conférence de la Paix permette d'établir définitivement le statut futur de l'Esthonie conformément au vœu de la population": see De Visscher in *Revue de droit international*, 3rd ser., vol. 3 (1924), p. 152.

[4] The French formula of recognition was on the same lines: ". . . le gouvernement français reconnaissait provisoirement l'existence de fait de l'Etat indépendant de Latvie en attendant que les Puissances alliées eussent pu résoudre, de concert, la question de droit": Lagarde, *La reconnaissance du gouvernement des Soviets* (1924), p. 20, n. 1.

an announcement was made of the provisional recognition by the British Government of the Lithuanian Government as a *de facto* independent body.

In these and similar cases the expedient of *de facto* recognition was adopted owing to the uncertainty of the situation pending the absence of a definite settlement. Most of the governments in question were effective, for the time being, in their territories. But there was, in the circumstances, no guarantee of the permanence of their rule. Moreover, in the case of Russia the parent State lay shattered in the throes of revolutionary convulsion. It was thought that she was only temporarily incapable of resisting by force the creation of the new States, and that there was no legal basis for definitely recognizing the new States as independent of their mother State at a time when the legal capacity of the latter was suspended. It appears, in particular, from contemporaneous pronouncements of the authorities of the United States that the revival of a Federalist Russia, with her territory largely unimpaired, was considered to be a distinct possibility.[1] Recognition *de facto* afforded a convenient solution of the difficulty. A measure of recognition as a *de facto* Government was also granted by the United States, in the concluding stages of the First World War, to the Czechoslovak National Council.[2]

The manner of the recognition of the Government of Soviet Russia in 1920 and in subsequent years provides a further illustration of the wide adoption of the expedient of *de facto* recognition. A number of States which recognized the Soviet Government did so in the first instance by way of *de facto* recognition in a series of provisional agreements. In some of those engagements[3] the *de facto* character of the recognition was emphasized by the latter being

[1] See, for a review of the various acts of recognition of these countries by the United States, Hackworth, I, §37; *U.S. For. Rel.*, 1918, *Russia*, vol. II, pp. 841, 851; 1920, vol. III, p. 463. See also, as to Latvia, Laserson in *A.J.*, 37 (1943), 233–47; as to Esthonia see Heumann, *Aspects juridiques de l'indépendance estonienne* (1938). As to Finland see Hackworth, I, 8–41, and Graham, *Diplomatic Recognition of Border States*, Part I: *Finland* (1935).

[2] But only a measure. It appears that on 3 September 1918 the United States accorded recognition to the Czecho-Slovak National Council as a "*de facto* belligerent government clothed with proper authority to direct the military and political affairs of the Czechoslovaks": Hackworth, I, p. 206. It is doubtful whether this amounted to recognition as a *de facto* Government in the accepted sense. As late as 14 February 1919, the American Secretary of State doubted whether "any further act of recognition of the Czechoslovak Republic" was desirable at that time in view of the fact that the frontiers of that State had not yet been definitely determined: *op. cit.*, p. 208. In general, it is of interest to note that although, with regard to the Czechoslovak and Polish representative bodies in the course of the First World War, the term "recognition" was used in various connotations, they were not recognized either by Great Britain or by France as Governments, either *de facto* or *de jure*. The limited recognition given by the United States to the Czechoslovak forces as a co-belligerent army and the Czechoslovak Council as a Government directing that army cannot, within its limited scope, be regarded as an improper exercise of the power of recognition. For while the effectiveness of that authority, exercising responsible control over organized military forces, did not extend to its national territory, it was not, within its limited sphere, a pure pretension. For this reason the recognition given to the Czechoslovak National Council in 1918 may be put on a higher plane than that of a "form of belligerent activity" as suggested by Hyde, *International Law* (1922), vol. I §40. See also Hobza in *Revue Générale de droit international public*, 29 (1922), pp. 387, 388, and Buza in *Zeitschrift für Völkerrecht*, 13 (1924), pp. 114, 155. For the texts of the successive acts of recognition of the Czechoslovak and Polish authorities in 1918 see Hackworth, I, ss. 39, 44; *U.S. For. Rel.*, 1918, Suppl. I, vol. I, pp. 813–51, 878–81; Smith, *Great Britain and the Law of Nations*, vol. I. (1932), pp. 234–7.

[3] A list of these will be found in *A.J.*, 28 (1934), p. 97. See also Appendix XXIV in Taracouzio, *The Soviet Union and International Law* (1935); and see *ibid.*, pp. 173–5. See also Toynbee, *Survey of International Affairs*, 1924, pp. 228–62.

expressly distinguished from *de jure* recognition.[1] In some cases the parties attached practical consequences to the circumstance that only *de facto* recognition had been given. Thus Article II of the Danish-Russian Preliminary Agreement of 23 April 1923 provided that, except in exchange for corresponding compensation, Denmark shall not be entitled to claim the special privileges granted by Russia to States which had recognized or might recognize her Government *de jure*.[2]

In the course of the international crisis brought about by the invasion and annexation of Abyssinia by Italy in the years 1935 and 1936, recognition *de facto* once more played a prominent part. The Italian rule over Abyssinia was recognized by a number of States, in the first instance, *de facto* only; recognition *de jure* followed at a later date.[3] The recourse to recognition *de facto* was, in this case, the result not of any uncertainty as to the effectiveness or even of the permanence of the conquest. It was due to the belief that the new situation was brought about by means contrary to international law and that it did not, therefore, in itself afford an adequate basis for acquisition, *de jure*, of a legal title.

Finally, in the grave international situation which arose out of the Spanish Civil War in the years 1936–9 recognition *de facto* once more played a prominent part. Thus the revolutionary (Nationalist) Government of Spain under General Franco was originally recognized by Great Britain as a government (or "insurgent government"[4] or "nationalist government"[5]) exercising "*de facto* administrative control over the larger portion of Spain".[6] After the decision had to all appearances been reached in the Civil War, the revolutionary Government was recognized *de jure*.

The Meaning of the Distinction between de jure *and* de facto *Recognition.* It

[1] In Article I of the Provisional Treaty of Commerce of 5 June, 1922, between Czechoslovakia and Russia the parties stated expressly that the Treaty did not prejudice the question of recognition *de jure*: Martens, *N.R.G.*, 3rd ser., vol. 18, p. 643.

[2] Martens, *N.R.G.*, 3rd ser., vol. 14, p. 415. Similar provisions appeared in Arts. IV, VII, VIII and IX of the Agreement. In June 1924 Denmark informed the Russian Government that it was extending recognition *de jure* and claimed simultaneously the concession of most-favoured-nation treatment in accordance with Article II of the Agreement of 1924. In reply the Russian Government stated that it felt compelled to limit the most-favoured-nation treatment to States which had recognized the Union *de jure* on or before 14 February 1924—a somewhat unilateral interpretation. For the exchange of correspondence see Martens, *N.R.G.*, 3rd ser., vol. 24, pp. 868–71. When on 15 December 1925, Norway recognized the Russian Government *de jure*, by means of a comprehensive Treaty of Commerce and Navigation, the Treaty provided, in Art. 32, that, subject to comprehensive exceptions, the stipulations of the Treaty would not apply to rights and privileges accorded to States which had recognized the Russian Government *de jure* before 15 February 1924: Martens, *N.R.G.*, 3rd ser., vol. 26, p. 472.

[3] In particular by Great Britain and France. Since December 1936 Great Britain recognized the Italian Government as the Government *de facto* of the parts of Abyssinia under its control. For a series of statements of the British Government on the subject see *Parl. Deb.*, House of Commons, 17 March 1938, cols. 617–18, and 11 May 1938, cols. 1608–9. See also Rousseau, *Le conflit Italo-Ethiopien devant le droit international* (1938), pp. 237–51. In January 1938, the Queen of Holland, while drawing attention to the necessity of taking into account the fact of military occupation of Abyssinia, assured the Emperor Haile Selassie that "Her Government had no intention of proceeding to recognition *de jure*": *Documents on International Affairs*, 1938, vol. I, p. 252.

[4] As stated in the certificate of the Foreign Office in *Banco de Bilbao* v. *Sancha and Rey*, [1938] 2 K.B. 176.

[5] As stated in *Compañia Naviera Sota y Aznar* v. *Ramon de la Sota* (*British Year Book of International Law*, 20 (1938), p. 126).

[6] *The Arantzazu Mendi* [1938] P. 233; [1939] P. 37; [1939] A.C. 256.

has been shown that *de facto* recognition has been repeatedly resorted to in difficult international situations, and that, whatever may be its merits, it must now be regarded as firmly established in international practice. This being so, what is the meaning of *de facto* recognition as distinguished from *de jure*? In the first instance it ought to be clearly understood that the distinction between *de jure* and *de facto* recognition is altogether unrelated to the question of the legality, from the point of view of internal constitutional law, of the new State or government. When, therefore, a State or government is recognized as being *de facto* or *de jure*, the distinction refers not to any conformity with the internal law of the State but to the requirements of international law. Some writers define a *de jure* government as one which has come into power in conformity with the constitution of the State;[1] while a *de facto* government is, according to that definition, one which has come into power in disregard of the constitutional provisions but which effectively exercises power over the entire territory of the State. That definition may be useful for some purposes, but it is not easy to see what is its relevance for the purpose of recognition in international law. Does it mean that only the *first* effective revolutionary government is a *de facto* one and that its successors which come into power in pursuance of the constitution adopted under the aegis of the new political régime, are *de jure* governments? This would reduce the definition to a mere technicality. If, on the other hand, we extend the requirement of legitimacy of origin not only to the government originally responsible for the breach of the constitution, but also to its successors, then clearly no government can properly be described as being *de jure*. Every one of them is based on a constitution which, in a more or less distant past, owes its origin to a revolution. In 1921 the British Government recognized the Soviet Government as the *de facto* Government of Russia. In 1924 it formally recognized that Government as the *de jure* Government of Russia. What happened in the intervening period to make possible a change in the situation? The origin of the Soviet Government was as unconstitutional in 1924 as it was in 1921. Neither could the change in the character of the recognition be explained by the disappearance of any doubts as to the stability of the new Government. The position of the Soviet Government was no more precarious in 1921 than it was in 1924. The origin of the revolutionary Government of General Franco in Spain was no more legitimate in 1939, when it was recognized *de jure*, than it was in 1937, when it was merely recognized *de facto*.

The unhelpfulness of the attempts to base the distinction between *de jure* and *de facto* recognition on considerations of the municipal law of the State concerned is even more apparent in the case of recognition of new States or of annexation of old States as in the case of Abyssinia. The recognition *de jure* of the Italian annexation of Abyssinia in 1938, when contrasted with the recognition *de facto* which preceded it, had no meaning if related to the municipal law of either Italy or Abyssinia. These considerations show that

[1] For a clear expression, from this point of view, of the opinion that the characterization of a government as *de jure* or *de facto* is a matter solely for the constitutional law of the State concerned, see the Opinion of the French-Mexican Mixed Claims Commission in *Georges Pinson Claim*: *Annual Digest of Public International Law Cases*, 1927–8, Case No. 136 (at p. 204). See also the award of President Taft in *Great Britain* v. *Costa Rica*: *ibid.*, 1923–4, Case No. 15 at p. 37).

unless we direct our attention to a province other than the municipal law of the State in question we are not likely to benefit by the accepted explanations of *de facto* recognition, such, for instance, as that given by Montague Bernard, adopted by Wheaton, and frequently relied upon in judicial decisions:[1] "A *de jure* government is one which, in the opinion of the person using the phrase, *ought to possess the powers of sovereignty*, though at the time it may be deprived of them. A *de facto* government is one which is really in possession of them, although the possession may be wrongful or precarious."[2] What is meant by saying that a government is *de jure* if it "ought to possess the powers of sovereignty"? Ought it to possess them as a matter of municipal or of international law? It has been shown that only the latter alternative supplies a satisfactory explanation of the distinction between *de jure* and *de facto* recognition. Recognition *de facto* takes place when, in the opinion of the recognizing State, notwithstanding the presence of the principal condition of recognition, namely, that of effectiveness, there are absent other conditions of recognition which, in the opinion of the State in question, are required by international law. The result is—and this is the essential feature of *de facto* recognition—that for the time being recognition thus granted must be regarded as provisional and liable to withdrawal in case the prospect of the conditions being fulfilled should finally disappear. It is in this sense that *de facto* recognition must be regarded as revocable—"revocable" meaning not "revocable at will" but on account of supervening or continued absence of the conditions of recognition as laid down by international law.

The recognition *de facto* of the Soviet Government in 1921 provides a good example of this aspect of recognition. The effectiveness of that Government was not in question. Popular approval was, at that time, ceasing to be a test of recognition possessing any degree of reality. When Great Britain concluded on 16 March 1921 a Trade Agreement with Soviet Russia, the British Government treated it as an agreement "recognising the Soviet Government as the *de facto* Government of Russia".[3] The British Prime Minister stated that "They [the Soviet Government] have as complete control over that vast territory as any Government could possibly have under present conditions, and therefore they have to be recognized as the *de facto* Government of that Empire".[4] But recognition *de jure* was withheld and was not granted until 1 February 1924. The reason, generally adduced, for the refusal of *de jure* recognition was the unwillingness of the Soviet Government to give assurances as to the fulfilment of its international obligations with regard to the liabilities of its predecessors and as to its own conduct in such matters as confiscation of foreign property and revolutionary propaganda abroad.[5]

[1] See, e.g., *Luther* v. *Sagor*, [1921] 3 K.B. 532, at p. 543.

[2] See Wheaton, *International Law*, 5th English edition (1916), p. 36.

[3] The Prime Minister in the House of Commons on 22 March, 1921: *H.C. Debates*, vol. 139, col. 2506.

[4] *Ibid.*

[5] Sir Frederick Pollock, in a valuable contribution to the subject—in *The Times* newspaper, 4 February, 1924—dealt squarely with some of the difficulties inherent in the question. He defined as a government *de jure* one which either derives its power by succession under the constitution or custom of the land (a definition which is clearly provisional, inasmuch as few governments, if any, derive their legal power in an unbroken chain of continuity from the original con-

Effectiveness of power—effectiveness either in its literal sense or as evidenced by an adequate expression of popular consent—within the territory of the State is an essential and the principal condition of recognition both of States and of governments. However, in practice other conditions have often been regarded as essential. Some of these, like a reasonable prospect of permanency and stability (in the case of new governments) or the final and apparently irrevocable defeat of the pretensions of the parent State (in the case of the rise of new States) are generally admitted. Others, like the free acceptance of the new régime by the majority of the population, or the ability or willingness to fulfil international obligations, although more controversial and, occasionally, less capable of supplying a working test of recognition, have nevertheless found a place in the practice of States. They have often been acted upon not as a matter of political bargaining and convenience, but as representing, in the view of recognizing States, proper conditions of recognition as laid down by international law. The government of an established or a new State may for the time being be in full exercise of effective power within its territory without, however, fulfilling all or some of the other conditions. It may be maintained that so long as those other conditions have not been complied with there can be no recognition at all, and that full recognition or complete refusal of recognition are the only alternatives. But the necessities of international intercourse do not favour any such rigid dichotomy. They demand that as soon as the most important condition is fulfilled—namely, that of effectiveness—its consequences should be admitted by an appropriate act of recognition. This is the purpose of *de facto* recognition. It is a declaration that the body claiming to be the government of an established or a new State actually wields effective authority without, however, satisfying other conditions of full, *de jure*, recognition. Should these absent conditions be forthcoming, full recognition *de jure* will become a matter of course; should they remain permanently absent recognition will lapse automatically or will be finally and expressly withdrawn.[1]

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stitution) or one "which had not a legal origin, but has acquired the consent of the governed by express ratification, such as, in our time, a popular vote, or by general acquiescence coupled with the absence of any effective adverse claim." The latter possibility was, apparently, intended to cover the case of the recognition *de jure* of Soviet Russia in 1924, but it is doubtful whether the explanation really covered the case at issue. For the degree of general acquiescence in the Soviet régime was probably not higher in 1924 than in 1921 when merely recognition *de facto* had been granted. General acquiescence is a good reason for granting *de facto* recognition; it does not explain *de jure* recognition. The latter has a meaning only as a term of international law, namely, as a declaration that in the view of the recognizing State there are present all the conditions of recognition as required by international law.

[1] Liability to withdrawal seems to have been regarded by the Court as the essential feature of the *de facto* recognition which Great Britain had extended to Esthonia: "I read the letters of the Foreign Office as being statements which do recognize, and recognize to the full, the sovereignty of Esthonia; but with the limitation that under the exceptional conditions due to the setting up of the Peace Conference no undertaking could be given to continue the recognition if conditions altered": *The Gagara*, [1919] P. 93 at 103. Strupp, in *Théorie und Praxis des Völkerrechts* (1925), p. 19, and in *Recueil des Cours*, vol. 47 (1934) (i), p. 451, considers limitation of international capacity to be an essential feature of recognition *de facto*. So also does Fedozzi, *Trattato di diritto internazionale* (1933) 2nd ed., p. 194. But see Spiropoulos, *Théorie générale du droit international* (1930), p. 137. Probably the limitations of the international rights of the State or Government which has been recognized *de facto* are one of the consequences of the limited nature of such recognition; they are not in themselves the

To explain the meaning of *de facto* recognition as being due to the absence of requisite conditions of recognition other than effectiveness is not necessarily to maintain, at least with regard to recognition of States and governments, that it is a sound and unavoidable expedient. The principal and probably the only essential condition of recognition of States and governments is effectiveness of power within the State and actual independence of other States. Other conditions are irrelevant to the true purpose and nature of recognition. This means that, on sound principle, an effective government is entitled to recognition not only *de facto* but also *de jure*—"effectiveness" in this connection meaning either effectiveness of power pure and simple regardless of any adequately expressed acquiescence of the population or, perhaps more accurately, effectiveness based on popular consent which alone, as a rule, provides evidence of permanence. However, that principle of recognition has not yet become fully part of accepted practice, and to that extent *de facto* recognition seems to be a necessary expedient, especially in cases when effectiveness is not accompanied by a reasonably assured prospect of stability. On the other hand, there would seem to be full scope for *de facto* recognition in situations where conditions other than effectiveness of power are a legitimate consideration. This applies in particular to recognition of a new international title which has its origin in an international wrong, as in the case of the Italian annexation of Abyssinia in 1936. In such cases *de facto* recognition, which takes into account the actuality of power while expressly refusing to admit its legality in the field of international law, is a proper device for combining disapproval of illegal action with the requirements of international intercourse. But, when preceded by the acceptance of an obligation of non-recognition, it is a legitimate device only so long as we bear in mind that the difference between *de jure* and *de facto* recognition is one of substance and so long as *de facto* recognition is not used for the purpose of avoiding any obligation of non-recognition that may have been undertaken.

Legal Effects of de facto *Recognition as Distinguished from* de jure *Recognition.* It is occasionally maintained that the difference between *de facto* and *de jure* recognition is purely political, which is probably intended to mean that for the purposes of municipal and international law there is no difference between *de jure* and *de facto* recognition.[1] Having regard to the function

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differentia specifica distinguishing *de facto* and *de jure* recognition. This seems to be the view of Strupp in *Recueil des Cours*, vol. 47 (1934) (i), p. 449, and Liszt, *Völkerrecht* (Fleischmann's edition, 1925), p. 9. See, for a discussion of this question, Scalfati Fusco, *Il riconoscimento di Stati nel diritto internazionale*, (1938) pp. 239–52. See also Erich in *Recueil des Cours*, vol. 13 (1926) (iii), p. 486; Kunz, *Die Anerkennung von Staaten und Regierungen im Völkerrecht* (1928), pp. 50–3, 132–4. Some, like Fauchille, I (1), p. 325, regard recognition *de facto* as synonymous with tacit recognition. Actually, tacit (or implied) recognition may be either *de jure* or *de facto*. There are interesting observations by Chief Justice Chase in *Thorington* v. *Smith* (8 Wallace, 1, 8–10; Moore, *Digest*, I, p. 41) and in *Williams* v. *Bruffy* ((1877), 96 U.S. 176, 185–6) on the meaning of a *de facto* government, but these, although often quoted in this connection, are not germane to the issue of *de facto* recognition.

[1] See, e.g., Brierly, *The Law of Nations* (2nd ed., 1936), p. 110—a view which has been modified in the third edition (1942), pp. 107, 109; McNair, *Legal Effects of War* (2nd ed., 1944), p. 353, who suggests that the "distinction is mainly, if not entirely, political". See also above, p. 165, n. 1.

which, as shown above, *de facto* recognition fulfils in the present stage of international organization, that view cannot easily be accepted. The distinction between *de facto* and *de jure* recognition forms part of or underlies numerous treaties and pronouncements of governments. Neither is it a view which finds support in judicial practice. Undoubtedly in the decisions of English and American courts recognition *de facto* has been treated for some purposes as having the same legal consequences as recognition *de jure*. Thus it is now an established rule that States and governments recognized *de facto* enjoy full jurisdictional immunities[1]—a rule which commends itself for its soundness seeing that in the present state of opinion on the subject the assumption of jurisdiction over a foreign State or government is incompatible with normal international intercourse (the extent of which is essentially the same in both kinds of recognition) and as such is calculated to cause international friction. For this reason courts in the United States have, perhaps somewhat illogically, extended such immunity, in some respects, to governments which have not been recognized at all.[2] It has also been held repeatedly that there is no distinction between *de jure* and *de facto* recognition for the purpose of acknowledging the validity of the internal acts, legislative and other, of the recognized authority—a principle clearly following from the admitted effective existence of the State or government in question.[3] Moreover, in an authoritative case English courts have conceded jurisdictional immunity to a *de facto* Government against the *de jure* Government of the same State—a decision which, it is submitted, is open to question.[4] But otherwise courts have shown no disposition to assimilate generally *de jure* and *de facto* recognition—even in cases in which, in the issue directly before the court, the distinction was ignored.

Thus in *Luther* v. *Sagor*—a case which frequently, though inaccurately, has been referred to as an authority for the view that there are no legal consequences attaching to the distinction between *de jure* and *de facto* recognition—an attempt was made, on the part of the respondents, to draw a distinction between *de jure* and *de facto* recognition in respect of retroactivity of recognition. It was maintained on behalf of the respondents that only *de jure* recognition could have a retroactive effect. The Court rejected that view. But neither Bankes L.J. nor Warrington L.J., who dealt with this point, committed themselves to the opinion that there was no distinction at all between *de facto* and *de jure* recognition. The former said: "For some purposes no doubt a distinction can be drawn between the effect of the recognition by a sovereign State of the one form of government or of the other, but for the present purpose in my opinion no distinction can be drawn."[5] Similarly, Warrington L.J. was of the opinion that "there is no

[1] *The Gagara*, [1919] P. 95.

[2] *Wulfsohn* v. *Russian Socialist Federated Republic* (1923) 202 App. D. (N.Y.) 421; 234 N.Y. 372.

[3] *Luther* v. *Sagor*, [1921] 3 K.B. 532. In *Oetjen* v. *Central Leather Company*—(1921) 246 U.S. 302—the language of the Supreme Court seems to have confined the operation of the principle of retroactivity to governments recognized *de jure*, but it is probable that that apparent limitation was not intentional.

[4] *The Arantzazu Mendi*, *ubi supra* (p. 169 above). See Lauterpacht in *Modern Law Review*, III (1939), pp. 1–20, and Briggs in *A.J.*, XXXIII (1939), pp. 689, 699.

[5] [1921] 3 K.B. 532, at p. 543.

difference for the present purpose between a government recognized as such *de jure* and one recognized *de facto*".[1]

That there exists a substantial difference between the two kinds of recognition is shown by the decision in the case of *Haile Selassie* v. *Cable and Wireless Limited* (No. 2).[2] In this case, at a time when Great Britain had recognized the Government of Italy as the *de facto* Government of Ethiopia, Italy claimed to be the successor to the rights of the Emperor of Ethiopia and as such entitled to certain sums owed to the latter by the defendant Company. An attempt was made to rely on the decision in *Luther* v. *Sagor* as an authority for the view that as there is, in law, no distinction between *de jure* and *de facto* recognition, the accepted rules of State succession operated with the effect of depriving the Emperor of Ethiopia of his title and of vesting it in Italy. The Court rejected that view. It held that the decision in *Luther* v. *Sagor* and similar cases had reference only to the validity of the internal acts of the recognized authority and that it had no bearing on the question of State succession. As the Emperor of Ethiopia continued to be recognized as the *de jure* sovereign of Ethiopia he was entitled to judgment.[3] It is a legitimate inference from the principle acted upon in this case, as well, generally, as from the practice of States, that the Government which is recognized *de jure* is entitled, as against the *de facto* Government, to continued title and control of the property of the State situated abroad, such as legation buildings, archives, and so on.

A further difference between the two kinds of recognition is that, unlike *de jure* recognition, mere *de facto* recognition does not, according to the British practice, necessarily carry with it full and normal diplomatic intercourse, although this may be conceded in individual cases.[4] In reply to a question addressed to it in the course of the proceedings in *Fenton Textile Association* v. *Krassin* the Foreign Office stated: "It is not the practice of the Sovereign to receive the representative of States which have not been recognized *de jure*, and, further, quite apart from the question of M. Krassin's position, no representative of the Soviet Government would be received by

[1] *Ibid.*, p. 551. In *Republic of Peru* v. *Peruvian Guano Company* (1887) L.R. 36 Ch.D. 489, and, to a lesser extent, in *Republic of Peru* v. *Dreyfus Brothers & Co.* (1888) L.R. 38 Ch.D. 348, the parties relied on the argument that as certain contracts were made by a *de facto* Government of Peru, which came to power by way of revolution, it was competent for its successor, which they described as the *de jure* government, to repudiate the contracts. The question of any distinction between *de facto* and *de jure* recognition was not raised in either case. It was admitted that the *de facto* government in question "was duly [apparently as the *de jure* government] recognized by the Queen", and the Court proceeded on that assumption. It declined to investigate the title of the government thus recognized.

[2] [1939] Ch. at pp. 187–94. That decision was overruled by the Court of Appeal on the ground that in the meantime the Italian Government had been recognized as the *de jure* Government of Ethiopia: [1939] Ch. 182, 195.

[3] For the converse suggestion that recognition *de jure* may also be the starting-point for the assumption of the obligations of its predecessors by the recognized Government, see the communication of the Russian Delegation to the British Prime Minister at the Genoa Conference of 1922: "The Russian Delegation wish also to make it clear, although it seems to be self-evident, that the Russian Government could not admit liability for the debts of its predecessors until it has been formally recognized *de jure* by the Powers concerned": as quoted by Sack in *Diplomatic Claims against the Soviets* (1918–38), New York University School of Law, *Contemporary Law Pamphlets*, Series I, No. 7 (1938), p. 20, n. 87.

[4] Thus it was stated, on 25 October 1944, in reply to a question in the House of Commons, that the representative in London of the French Provisional Government would be entitled to the same privileges, immunities and precedence as other heads of mission of corresponding rank after he had presented his Letters of Credence to the King as French Ambassador.

His Majesty's Government because the Soviet Government has not been recognized *de jure* as a State [*sic*]."[1] But it also appears, although not conclusively,[2] from the same case that the representatives of a Government which is recognized *de facto* only are not entitled to full diplomatic immunities. The defendant in the present case was a representative of the Soviet Government whose functions and immunities were defined in the Trade Agreement of 16 March, 1921, between Great Britain and Russia. That Agreement was subsequently interpreted by the Foreign Office as connoting recognition *de facto*.[3] The Court held that the status of M. Krassin was not such as to confer upon him immunity from civil process; his immunity, as defined by the Agreement, was limited to exemption from arrest and search.[4] The British Government had previously made the position clear to some extent. Subsequent to the recognition *de facto* of the Soviet Government it stated, in an answer to a question in the House of Commons, that the Soviet official agents in Great Britain would not be recognized as diplomatic representatives.[5] When Great Britain recognized in 1915 the Carranza administration as the *de facto* Government of Mexico she did not resume diplomatic relations with it. In fact, she expressly declined—on account of the attitude of the Mexican Government towards British subjects and their property—"to resume diplomatic relations with the Mexican Government and accord it the recognition implied by such a resumption."[6]

When in June 1924 Denmark informed the Russian Government of her decision to recognize "the Union Government *de jure*", she did it by proposing that "the position of the official representatives to be so modified in accordance with the general principles of the law of nations as the establishment of normal diplomatic relations between the two countries entails."[7] On the other hand, when in 1915 the United States recognized the *de facto* Carranza Government, that act was accompanied by an intimation of willingness to resume formal diplomatic relations.[8]

It will thus be seen that in some respects the legal effects of *de facto* recognition are indistinguishable from those of *de jure* recognition inasmuch as the former constitutes the acknowledgment of the effective authority of

[1] (1922) 38 *T.L.R.* 260.

[2] See below, n. 4.

[3] See *Luther* v. *Sagor, ubi supra.*

[4] The language used by both Scrutton and Acton LL.J. suggests that the question might have been open to doubt if the immunities of M. Krassin had not been defined in the Trade Agreement but had to be deduced from general international law. As Atkin L.J. (as he then was) said: ". . . it appears to me that even if the official agents when received in this country would, in the absence of agreement, have been entitled to full immunity, yet if the respective Governments by whom and to whom respectively they are sent choose to agree as to the precise immunity to be given them, such an agreement must prevail" (at p. 262). However, it is not customary for Governments recognized *de jure* to stipulate the extent of the immunities of their representatives.

[5] *Parl. Deb.*, H. of C., vol. 139, col. 2198.

[6] See statement in the House of Commons on 13 May 1919: *Hansard*, vol. 115, col. 1472. See also *ibid.*, vol. 119, col. 348, as well as the statements of 24 and 25 May 1916, *ibid.*, vol. 82, cols. 2073, 2306. In August 1919 the British agent who was in charge of the British archives in Mexico was ordered by the Carranza Government to leave (*The Times* newspaper, 18 August, 1919).

[7] Martens, *N.R.G.*, 3rd ser., vol. 24, p. 868. This does not necessarily mean that the absence of normal diplomatic relations is the only consequence of withholding recognition *de jure*.

[8] See above, p. 166. See also Hackworth, vol. I, p. 260, and *U.S. For. Rel.*, 1917, pp. 910–12, 915, to the effect that in 1917 the Mexican representative to the United States was formally received as the ambassador of the *de facto* Government of Mexico.

the government concerned within the territory. In particular, the result of such acknowledgment is the recognition of the internal validity of the acts of the authority recognized *de facto*, and the concession to it of jurisdictional immunities in the courts of the recognizing State. On the other hand, it follows from the provisional character of *de facto* recognition that the *de jure* authority continues to represent the State in the matter of State succession and otherwise. Secondly, unlike recognition *de jure*, recognition *de facto* does not necessarily result either in resumption of full diplomatic intercourse or in conferment of diplomatic immunities upon the representatives of the authority recognized *de facto*. Finally, as *de facto* recognition is in its essence provisional and its transformation into recognition *de jure* conditional upon the fulfilment of the absent requirements of recognition, it follows that it may be withdrawn for reasons additional to those warranting the withdrawal of recognition *de jure*. In view of this, it cannot correctly be maintained that the distinction between *de facto* and *de jure* recognition is of a purely political nature.[1]

Implied Recognition, de facto *Recognition, and* de facto *Intercourse*. *De facto* recognition is an act as deliberate and explicit as *de jure* recognition. Because of the nature of the situations which give rise to it, it is occasionally of a more formal character than recognition *de jure*. Accordingly, there is no warrant for implying *de facto* recognition more readily than *de jure* recognition. In other words, it is not permissible to confuse implied recognition with *de facto* recognition—although this is occasionally done by writers[2] and although the Resolutions of the Institute of International Law of 1936 concerning the recognition of States and Governments seem to a large extent to support that view.[3] Thus, according to the latter, recognition "*de facto*" of a new government is manifested, *inter alia*, "by the maintenance of relations with the new government for the purposes of current affairs" (Article 14 (3)). Actually, practice abounds in instances of intercourse between States coupled with express denial of recognition either *de facto* or *de jure*.[4]

[1] When in December 1920 Esthonia and Latvia were refused admission to the League of Nations, one of the main reasons of the decision of the Assembly was the circumstance that at that time those States were recognized *de facto* only.

[2] See Fauchille, *Traité de droit international public*, vol. I (i) (1922), No. 206.

[3] See *American Journal of International Law*, 30 (1936), Suppl., pp. 186 and 187. See also Rolin in *Annuaire*, 38 (1934), p. 354.

[4] For a survey of the relevant practice see "Implied Recognition" in *British Year Book of International Law*, 20 (1944), pp. 123–50. See also, as to Great Britain, the instructions issued in 1820 to the British Minister at Lisbon to the effect that though there was no intention to accredit him to the revolutionary authorities in the capital, this need not interfere with his informal residence there for the purpose of transacting ordinary intercourse between the two countries: Smith, vol. I, p. 172. And see the statement by Sir John Simon on 31 January, 1934 to the effect that British consular representatives continued to be stationed in some of the principal cities of Manchuria, that they maintained such relations with the appropriate local authorities as appeared to be necessitated by British interests, and that no question of recognition was involved in those relations: *Parl. Deb.*, H. of C., vol. 285, col. 336. With regard to Mexico it was stated in the House of Commons on 13 May, 1919: "His Majesty's Government are not disposed, in view of the attitude of the Mexican Government, to accord recognition, implied by the resumption of diplomatic relations, but they have never ceased to make informal representations with regard to the treatment of British interests": *Parl. Deb.*, 1919, H. of C., vol. 115, col. 1472.

In 1931 we find the United States State Department instructing the authorities of the Panama Canal that there was no objection to recognizing the signatures of the authorities

This being so, *de facto* recognition, express or implied, must be clearly distinguished from various forms of intercourse conducted either through special agents or by persons previously accredited in a diplomatic capacity to recognized constitutional authorities. *De facto* intercourse is not *de facto* recognition, and it is only because of the exaggerations of the notion of implied recognition that there has been a tendency to identify intercourse with *de facto* recognition.

De facto *Recognition and the Obligation of Non-recognition.* The circumstance that recognition *de facto* is, as a rule, a formal act and that practice shows examples of intercourse, not accompanied by recognition, in a variety of matters would seem to supply an answer to the question whether *de facto* recognition is compatible with any assumed obligation of non-recognition. The Advisory Committee set up by the Assembly of the League of Nations in connection with the non-recognition of Manchukuo was of the view that recognition *de facto* would not be compatible with the obligation of non-recognition.[1] On the other hand, in his statement to the Council of the League of Nations on 12 May 1938, the Emperor Haile Selassie insisted that recognition *de jure*—but not, it seems, recognition *de facto*—of the Italian conquest of Abyssinia was contrary to the obligations of the Covenant.[2] This, moreover, was the interpretation which Great Britain and other States put upon their obligation of non-recognition. Thus Great Britain, while professing to adhere to the obligation of non-recognition, recognized *de facto* the Italian occupation of Abyssinia.[3] Other States acted in the same way[4] —a line of conduct which was not challenged as being contrary to the assumed obligation of non-recognition.

Regardless of the part which the principle of non-recognition may be called upon to play in the future, the question of its relation to *de facto* recognition is one of intrinsic interest and merits consideration. On the one

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of the new revolutionary government "provided it is made clear that this does not imply recognition of the authorities as the *de facto* Government": Hackworth, I, p. 341. Explicit reservations to the effect that intercourse is not intended as recognition constitutes a frequent feature of the practice of the United States: *ibid.*, pp. 329, 330, 331. In 1920 the United States Chargé d'Affaires in Mexico was instructed to conduct any necessary dealings with the new authority in such a way as "not to permit any imputation that the present régime has been even *de facto* recognized by the Government of the United States": *ibid.*, p. 261. In December 1920 the United States were willing to accord merely *de facto* recognition to the new Government of Bolivia after proper elections had taken place and after the Bolivian Congress thus chosen had elected a Provisional President. It was only after further evidence of stability that the United States decided to grant recognition "not as the *de facto* Government, but as the constitutional Government of that Republic": *ibid.*, p. 225. In 1924 the United States Department of State instructed the consular officer at Vera Cruz in Mexico to refer to the Huerta administration not as a "*de facto* government" but as "*de facto* authorities": *ibid.*, p. 128.

[1] League of Nations, *Official Journal*, Special Supplement, No. 113, p. 11.

[2] League of Nations, *Official Journal*, 1938, pp. 336–47.

[3] On 16 December, 1936, the Secretary of State for Foreign Affairs informed the House of Commons that the British Government had no intention of recognizing *de jure* the annexation of Abyssinia. In a certificate issued by the Foreign Office in connection with the proceedings in *Bank of Ethiopia* v. *National Bank of Egypt and Liguori* ([1937] Ch. 513) it was stated that by the middle of December 1936 His Majesty's Government had recognized the Italian Government as being in fact the government of the area of Abyssinia then under Italian control.

[4] See above, p. 169. See also Rousseau, *Le conflit Italo-Ethiopien devant le droit international* (1938), pp. 237–51.

hand, it would appear that as the practice of States admits of a measure of intercourse unaccompanied by recognition either *de jure* or *de facto*, the latter, no less than the former, is a gratuitous relaxation of the obligation of non-recognition. However, it is clear that the amount of intercourse which is possible in the absence of recognition is limited; it is largely of a remedial character. Moreover, in the absence of recognition, *de facto* or *de jure*, courts are not normally in a position to treat as valid the legislative and administrative acts within the territory in question—a result which may be productive of much inconvenience and injustice. The attitude of non-recognition cannot, in the nature of things and without giving rise to international complications over a prolonged period, be an instrument of effective pressure in the economic and cognate fields. Its purpose is an expression both of moral disapproval and, in law, of reservation of freedom of action in relation to a change brought about by means contrary to international law and expressly declared to be illegal. An attitude of this kind may be compatible with *de facto* recognition. The provisional character of the latter emphasizes the absence of any obligation to continue the recognition. It stresses the irregularity and the illegality of the new situation. As such it may be deemed to be compatible with the limited purpose of the necessarily imperfect sanction of non-recognition.[1]

II. *Withdrawal of Recognition*

De facto recognition, it has been shown, is provisional in its nature and is, therefore, liable to be withdrawn as soon as it becomes clear that there is no prospect of the requisite conditions of recognition being fulfilled. Does this mean that *de jure* recognition cannot be withdrawn? This is the view held by many. Even those who regard recognition as being in the nature of a contractual bargain or voluntary grant are emphatic that once recognition has been given it is binding on the recognizing State by virtue of the rule *pacta sunt servanda* or otherwise.[2] The very idea that the legal personality of a State or the representative capacity of its government should be dependent on the continued good will of other States is deemed to be derogatory to the independence and the dignity of the State and inimical to the stability of international relations. Yet withdrawal of recognition is a frequent—and inevitable—feature of the practice of States. In principle there would seem to be no reason why recognition should not be liable to withdrawal so long as that act, like that of granting recognition, is conceived not as an arbitrary act of policy but as one of application of international law, namely, as a declaration that the objective requirements of recognition have ceased to exist.[3]

[1] This seems also to be the view of Professor Scelle, who considers recognition *de facto* in this connection to go no further than the admission of a "competence which is limited, precarious, devoid of any guarantee, exposed to all vicissitudes of enforced change, and which cannot be regularized except by the intervention of the League of Nations or of prescription *longi temporis* of indeterminate duration" (*Friedenswarte*, 1937, No. 2, p. 67).

[2] See, e.g., Kunz, *Die Anerkennung von Staaten und Regierungen im Völkerrecht* (1928), p. 99.

[3] Up to a point, these alternatives are put with some clarity by Fauchille (in vol. I (i) No. 213): He agrees that the answer to the question of revocability of recognition depends on the character attributed to the act of recognition. If, he says, recognition consists in the declaration of the existence of certain conditions of fact, it cannot, so long as these conditions are present, be withdrawn. If, on the other hand, it is a discretionary and voluntary act, a

Recognition—whether of States, governments or belligerency—is a declaration that there exist the requirements of international law, as ascertained *bona fide* by the recognizing State, with regard to the particular category of status. Recognition is not a contract or grant. It is a declaration of capacity as determined by objective facts. These facts are not necessarily enduring. A State may lose its independence or the necessary degree of cohesion as an organized community;[1] a government may cease to wield effective authority; a recognized belligerent may be utterly defeated. In all these cases the basis of recognition disappears, and outside States are entitled and bound to take cognizance of that fact. Undoubtedly, the decision, pertaining as it does to the principal manifestations of existence of States and governments, is one of obvious delicacy and responsibility. It must be exercised with a circumspection and restraint even more pronounced than the positive act of granting recognition. It cannot properly be used as an instrument of political pressure or disapproval.[2] But that does not mean that the decision need not be taken or that it is not constantly taken.

(*a*) *Withdrawal of Recognition of States.* Withdrawal of recognition from a State is often obscured by the fact that, having regard to the circumstances, it does not take place through an express declaration announcing the withdrawal, but through the act of recognition, express or implied, of the new

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view which he prefers, then it can be withdrawn at will in accordance with political considerations. He adds, by way of illustration, that as the capacity to fulfil the obligations of a civilized State is an original condition of recognition, it may be withdrawn if a State has shown that it is incapable of conducting itself in a civilized manner. The illustration is, of course, inconsistent with the view that withdrawal of recognition is a purely discretionary act. For it assumes the existence of an objective, though highly controversial and elastic, test of recognition.

[1] This, clearly remote, contingency was made the starting-point of some special pleading in connection with the suggestion that in 1931 and in the subsequent years Japan was entitled to withdraw her recognition of China as a State on the ground that because of internal disorders she had ceased to be an independent State. For the assertion that prolonged civil war or "anarchy" affects the continued existence of a State see Baty in *A.J.*, XXVIII (1934), pp. 444-55. See also Smith, vol. I, pp. 18–30. In the course of the Manchurian dispute between China and Japan in 1932 the latter maintained that as the result of prolonged disorders within her border, China ceased to be an "organized people" within the meaning of the Covenant: League of Nations, *Official Journal*, 1932, pp. 383, 384.

[2] It was suggested in 1920 by Pillet that after the World War of 1914–18 the Allied and Associated Powers ought to have withdrawn from the German Empire the benefits of international recognition, on the ground that it was incapable of fulfilling the obligations of a civilized State, and that they ought to have negotiated the treaty of peace with the representatives of the individual member States of Germany: *Le traité de Versailles* (1920), p. 28. For a similar suggestion with regard to National-Socialist Germany see Schwarzenberger, *International Law and Totalitarian Lawlessness* (1943), pp. 107–110.

In October 1918 France withdrew the recognition granted in January of that year to the provisional Government of the Finnish Republic. It is not clear whether this was a case of withdrawal of recognition from a State or from a particular Government. Probably the latter was the case. See the declaration made by the French Legation in Stockholm on 1 June 1918 that France "will not recognize in Finland any régime which may be established in an illegal way": *U.S. For. Rel.*, 1918, Russia, vol. II, p. 791. The reason given for the withdrawal of recognition was that the new Finnish State proclaimed in December 1917 was intended as an independent Finnish Republic, and that in October of that year, in defiance of the expressed wish of the people, Finland adopted a monarchical form of government and invited a German Prince to become King: see Fauchille, I (i), Nos. 167 (4), 213. See also Graham, *op. cit.*, pp. 160–1. It is probable that, far from constituting an instructive illustration of the power to withdraw recognition, the incident was in the nature of an exceptional political measure in time of war.

authority. In the case of extinction of a State through annexation, the government of the conquered State is as a rule reduced to a handful of persons in exile, and it may be both invidious and unnecessary to address to them an express declaration of withdrawal of recognition. On such occasions withdrawal of recognition has at times been effected by an intimation to the diplomatic representatives of the defunct State that their mission must be regarded as terminated and that they will not henceforth continue to be recognized as representing the State in question.[1] But, generally speaking, it is the recognition of the new authority which operates as withdrawal of recognition from the defunct State. Probably[2] there is no case on record in which recognition has been withdrawn from a State without a corresponding measure of recognition being granted to its successor. There are good reasons why this should be so. When a State is deprived of its independence and of its territory, these do not vanish into a legal vacuum. They are acquired by another State or by a number of States which have arisen on what was formerly its territory. When in 1938 Great Britain withdrew her recognition of Abyssinia, this step took the form of the *de jure* recognition of the Italian annexation of the Ethiopian Empire.[3]

(*b*) *Withdrawal of Recognition of Governments.* The position is to a large extent identical with regard to recognition of governments. Withdrawal of recognition from a group of persons hitherto representing the State and the subsequent or simultaneous grant of recognition to a new government which

[1] See, e.g., the British communication, in 1861, to the Chargé d'Affaires of Naples that he could no longer be accredited as a representative of the King of the Two Sicilies. This was after Great Britain had recognized the Kingdom of Italy, which had annexed the Neapolitan territories: Satow, *A Guide to Diplomatic Practice* (3rd ed., 1932), p. 113. On the other hand, in recognizing in 1861 the new Kingdom of Italy the French Government stated that while acting in conformity with the facts of the situation it must reserve "la liberté d'appréciation vis-à-vis des éventualités qui pourraient modifier cet état de fait": *Archives diplomatiques*, 1861, IV, p. 361. As to the withdrawal of recognition from Montenegro, see the letter of the Acting Secretary of State of the United States of 21 January, 1921, to the Montenegrin Consul-General in charge of the Legation, informing him that "in view of the present status of Montenegro, this Government no longer considers it necessary to accord recognition to her diplomatic and consular officers" and that the Letters Patent recognizing him as Honorary Consul of Montenegro were thereby revoked: *U.S. For. Rel.*, 1921 (ii), p. 946. See *ibid.*, pp. 947–9, for the protest of the Prime Minister and Minister for Foreign Affairs of Montenegro sent on 15 April, 1921, from Rome to the Secretary of State declaring that "no fact, either juridical or international, exists, on the strength of which the Government of the United States could break off diplomatic relations with the Kingdom of Montenegro". Previously, France had informed Yugoslavia that she had decided to recall the French diplomatic and consular representatives in the former Kingdom of Montenegro and to withdraw recognition from the representatives of ex-King Nicholas in France. See also *In re Savini and Others*, decided in 1927 by the Court of Appeal of Rome, where the Court held that the State of Montenegro ceased to exist, so far as Italy was concerned, when the Italian diplomatic representation in Montenegro was abolished in 1921: *Annual Digest*, 1927–8, Case No. 106. In March 1921 Great Britain cancelled the exequaturs of Montenegrin consuls.

[2] See above, p. 180, n. 1, as to Japan and China.

[3] Withdrawal of recognition cannot be implied from a mere *de facto* recognition of the new authority or, still less, from acts falling short even of *de facto* recognition. When in 1939 Great Britain (as well as other States) closed their legations in Prague and applied for exequaturs for consuls in Bohemia and Slovakia these steps, although described by the British Government as a *de facto* recognition of the position in these parts of Czechoslovakia, did not amount to a withdrawal of recognition from the Czechoslovak State. The same applies to similar steps taken in 1938 with respect to the annexation of Austria by Germany. Similarly, no such withdrawal of recognition was implicit in the act of closing the British Legation in Addis Abbaba in December 1936. It was stated by the British Government on 21 December, 1936, that that act did not constitute a recognition *de jure* of the Italian annexation of Abyssinia.

has been successful in displacing its predecessor, are constant occurrences. Such withdrawal is as a rule implied in the unequivocal recognition of the new régime. Occasionally recognition of the new Government and its withdrawal from the former Government take the form of two separate acts. Thus on 16 November 1933 there took place an exchange of Notes between the United States and the Union of Soviet Socialist Republics the object of which was, in effect, to put on record the recognition of the Soviet Government by the United States. On the same day an announcement was made that the latter "ceased to recognize" M. Uhget, the Financial Attaché to the Russian Embassy appointed by the Russian Provisional Government of 1917, who had been entrusted with the custody of the property of the Russian State.[1] In some instances the withdrawal of recognition has not been accompanied by the recognition of a rival authority. Thus in 1856 the United States withdrew the recognition of the revolutionary Walker Government in Nicaragua after they had recognized it several months before. The reason given was that the authority of that Government was seriously contested in Nicaragua.[2] Instances of withdrawal of recognition of a government, unaccompanied by a recognition of the new authority, are, and ought to remain, rare. Undoubtedly, a government which has ceased to be effective has no claim to recognition. However, so long as the party or parties which challenge its authority have not asserted themselves to the point of being themselves entitled to recognition, the established government, however weakened, is entitled to continued recognition. Effectiveness is presumed to exist so long as the lawful government has not been definitely displaced by a rival authority. Adherence to this principle is not likely to

[1] Department of State Publication No. 528 (Eastern European Series No. 1). On the same day the State Department informed M. Uhget that in view of the recognition of the Soviet Government by the United States the latter ceased to recognize him as Russian Financial Attaché (*A.J.*, 28 (1934) Supp., p. 13). Various Russian consuls appointed by the Czarist Government were informed that the exequaturs issued to them were revoked and their status as Russian consuls considered terminated (*ibid.*, pp. 13, 14).

[2] See Moore, I, p. 143. Recognition was in fact twice withdrawn within a short space of time. The first withdrawal was explained on the ground that the recognition granted by the United States Minister in Nicaragua was unauthorized by the home Government and unwarranted by the circumstances of the situation. In his instructions of 7 Dec. 1855, to the Minister, the Secretary of State said: "Considering the means by which the power that now predominates in that State was obtained, and the manner in which it is exercised, it can have no just pretension to be regarded as even a *de facto* Government. You will therefore on the receipt of this despatch at once cease to have any communication with the present assumed rulers of that country": Manning, *Diplomatic Correspondence of the United States, Inter-American Affairs*, 1831–60, vol. IV (1934), pp. 77, 78. Eight months later the United States, considering that the Government showed signs of stability and that the population was acquiescent, recognized the Rivas-Walker Government. But the recognition thus granted was soon withdrawn after General Rivas was displaced and Walker, a citizen of the United States, assumed the Presidency. For an account and interpretation of these events see the letter of Dana, the United States Minister Resident in Bolivia, to the Foreign Minister of that country, printed in Manning, *Correspondence*, 1831–60, vol. II (1932), pp. 53, 54. The withdrawal in 1862 of the recognition by the United States of the Paez Government in Venezuela was an instance of disavowal and annulment of the recognition granted by the United States Minister without the authority of his Government: Moore, I, p. 149. See also the instructions issued in July 1883 by the United States Secretary of State to the Minister in Peru to the effect that although it was not the intention of the United States hastily to withdraw or to transfer the recognition conceded to the Calderon Government, that step would be taken if it were clearly shown that the rival revolutionary Government of General Iglesias was supported by the overwhelming majority of the nation; Moore, I, p. 158. As to the withdrawal of recognition from the Russian diplomatic and consular representations in China in 1920 see *U.S For. Rel.*, 1920 (i), p. 765.

cause undue inconvenience seeing that there is no objection to regular communication with the insurgent authorities and that the fact of non-recognition does not prevent outside States from insisting on or exacting the fulfilment of generally recognized rules of international law.

The action taken by Great Britain in 1860 against the Miramon Government in Mexico exhibits some features of withdrawal of recognition unaccompanied by the simultaneous recognition of a new government. This took place after the British mediation with both parties to the civil war had been rejected. However, the incident is one not of withdrawal of recognition but of severance of diplomatic relations on account both of continuing disorders in the country and of criminal acts committed by the agents of the Government in power against their opponents and against British subjects.[1] In fact what is in this connection often referred to as withdrawal of recognition amounts to and is intended merely as severance of diplomatic relations—a step which frequently takes place as a sign of disapproval of an unfriendly or an illegal act. While the withdrawal of recognition as a measure of disapproval of the conduct, however illegal, of a State or Government is incompatible with the purpose of recognition, severance of diplomatic relations may be and has often been resorted to. Thus, within three years of the recognition *de jure* of the Soviet Government in 1924, the British Government severed diplomatic relations with Russia on the ground that the Russian Government was responsible for fomenting revolutionary propaganda in Great Britain. But there was no tendency, either on the part of the Government or of courts,[2] to consider the severance of diplomatic relations as tantamount to withdrawal of recognition. The British Government announced that that step was not intended to interfere with the ordinary course of legitimate Anglo-Russian trade and that no obstacles would be placed in the way of such trade.[3] Severance of diplomatic relations often takes place as a preliminary to a declaration of war and

[1] The relevant part of the British Note—reprinted in Manning, *Correspondence*, 1831–60, vol. IX (1937) (Mexico), p. 1211—ran as follows: "The Undersigned has been instructed to break off relations with the Government of His Excellency General Miramon and to retire from Mexico: nor can His Majesty's Government consent to reopen relations with Mexico as a civilized power, until they see established either a Government possessed of some well-founded prospect of stability, or a provisional arrangement likely to ensure such a result."

[2] In *Princess Paley Olga* v. *Weisz*, decided in 1929 at a time when the diplomatic relations between the two countries were still severed, it was held, in effect, that the consequences of recognition, as laid down in *Luther* v. *Sagor* and other cases with regard to the validity of the internal acts of the recognized authority, continued to operate notwithstanding the severance of diplomatic relations: [1929] 1 K.B. 728. There is occasionally a tendency to speak of "severance of diplomatic relations" when what is meant is simply the absence of recognition, See, e.g., Harvard Research, *The Law of Treaties* (1935), p. 1055. See also Hackworth, I. pp. 280–1, for an account, under the heading "Recognition of New Governments", of the severance of diplomatic relations with Venezuela in connection with outstanding differences arising out of injuries to American interests.

[3] See *Survey of International Affairs*, 1927, p. 272. As to the severance of diplomatic relations between Uruguay and Soviet Russia and the contention of the latter that the severance of relations was incompatible with membership of the League see *League of Nations, Official Journal*, 1936, p. 92. When in 1936 the Iranian Government withdrew its diplomatic representative from the United States as a measure of disapproval of an alleged insult to the person of the ruler of Iran, it explained that that measure in no way affected the status of the American Legation in Teheran and that the Iranian Government would continue to conduct business with it: Hackworth, IV, p. 459. In 1938 Mexico severed diplomatic relations with Great Britain because of the alleged sharpness of the British protest against seizures of British property: Cmd. 5758 (1938). See also Hansard, *Parl. Debates*, vol. 338, col. 2690, and vol. 340, col. 86; *The Times* newspaper, 16 May 1938.

does not imply in any way withdrawal of recognition of the government affected.[1]

(c) *Withdrawal of Recognition of Belligerency.* Recognition of belligerency naturally comes to an end, whether the withdrawal of it takes place through a formal act or otherwise, when, with the defeat of one of the parties to the conflict, there disappears the principal condition of recognition of belligerency, namely, the existence of a state of hostilities on a wide scale. The action of the British Government at the close of the Civil War in the United States provides, from this point of view, an instructive example of withdrawal of recognition.[2] However, actual termination of hostilities is not the only reason for withdrawing recognition of belligerency. This may happen owing to the disappearance of conditions of recognition other than the existence of an actual state of hostilities, as, for instance, would be the case if the parties to the struggle ceased to conduct themselves in accordance with the rules of warfare.

(d) *Withdrawal of Recognition of Annexation.* In a communication sent in November 1940 by the British Secretary of State for the Colonies to the High Commissioner for Palestine, in connection with an action pending there, it was stated the the "*de jure* recognition by His Majesty's Government of the Italian conquest of Ethiopia had been withdrawn".[3] In view of this the Supreme Court of Palestine held, on the authority of *Haile Selassie* v. *Cable and Wireless, Limited*,[4] that "the title of the Italian Government to the property in question can no longer be recognized". It does not appear that any other announcement of the withdrawal of recognition was made to the world at large. On 5 February 1941 the Foreign Secretary announced in the House of Commons that "His Majesty's Government would welcome the reappearance of an independent Ethiopian State, and recognize the claim of the Emperor Haile Selassie to the throne."[5] It would thus seem that the withdrawal of *de jure* recognition of the Italian conquest was independent either of the circumstance of any cessation of effective Italian rule over Abyssinia—this did not happen until later in the war—or of any simultaneous recognition of Abyssinian sovereignty. The legal explanation of that measure was probably the fact that the object of the recognition *de jure* as given in

[1] See, e.g., the severance of diplomatic relations between the United States and Germany on 3 February 1917 (*U.S. For. Rel.*, 1917, Suppl. 1, pp. 106, 108) and between the United States and Austria-Hungary on 9 April 1917 (*ibid.*, p. 594).

[2] See the *London Gazette* of 6 June, 1866, for a letter from Earl Russell to the Admiralty and other Departments dated 2 June, 1865, announcing that "Her Majesty's Government were of opinion that Neutral Nations could not but consider the Civil War in America at an end." In an Opinion of the Law Officers of 24 November, 1868 (F.O. 83/2225), 2 June, 1868, was given as the date on which in the view of the British Government the belligerent character of the so-called Confederate States had ceased. See, on the other hand, the Opinion of the Law Officers of 29 April, 1869 (F.O. 83/2299) advising that it was not necessary for Her Majesty to revoke formally her Order in Council of 14 May 1868, enjoining neutrality on all British subjects in Japan: "That order only applied to British subjects abetting either of the contending parties during the hostilities then existing between the Mikado and other belligerents within the Japanese Dominions, and as such hostilities have come to an end Her Majesty's Order in Council ceases to be operative for want of parties, to whom it would be applicable."

[3] *Azazh Kebbeda Tesema* v. *Italian Government*: *Annual Digest*, 1938–1940, Case No. 36.

[4] See above, p. 175.

[5] Parl. Deb., Commons, vol. 368, col. 804.

1938, namely, the achievement of a general settlement aiming at the pacification of Europe and of the world, was destroyed by the action of Italy in 1940 in declaring war upon Great Britain and France. In so far as the recognition of new titles has, in contradistinction to other forms of recognition, the character of a contractual arrangement, the British action cannot be regarded as arbitrary. But there may be objections to treating in this way what is in essence an executed territorial arrangement.

Liability to Withdrawal and the Distinction between de jure *and* de facto *Recognition.* It has been submitted that the principal distinguishing feature of *de facto* recognition as compared with *de jure* recognition is that it is provisional and subject to withdrawal if the conditions of recognition, as laid down by international law, cease to exist or if the conditions still to be fulfilled at the time of recognition fail to materialize. However, if, as it is believed is the case, recognition *de jure* is in principle subject to withdrawal for the same reasons, how can it be maintained that liability to withdrawal is the principal distinguishing feature of *de facto* recognition? The answer is that, in a substantial sense, the distinction is one of degree. In the case of *de facto* recognition the liability to withdrawal is prominently in the minds of the State giving or receiving recognition. That liability to withdrawal is contemplated by reference to a given set of circumstances in relation to which withdrawal of recognition follows in the ordinary course, whether there exists an alternative recipient of recognition or not. On the other hand, recognition *de jure* can properly be withdrawn only if at the same time it is granted to another authority which combines more effectively the requisite conditions of statehood or of governmental capacity. The result is that recognition *de jure*, at the time when it is given, partakes of a finality which can be destroyed only in exceptional cases and subject to exacting proof. It is that finality which explains the different treatment, by courts and otherwise, of *de jure* and *de facto* recognition.

The problem of withdrawal of recognition raises, in a manner even more pronounced than that of grant of recognition, the question of collectivization of the process of recognition. The rise of international personality, the acknowledgment of the representative capacity of persons claiming to be the government of a State, and the grant of belligerent rights are acts of primary importance in the life of States, and it has been suggested elsewhere that only the collectivization of the process of recognition can be regarded as commensurate with its significance.[1] Even more cogent considerations urge the necessity of applying such collective procedure to the withdrawal of recognition.

III. *Conditional Recognition*

Liability to Withdrawal on Account of Non-Fulfilment of Conditions of Recognition. Recognition, it has been shown, can be withdrawn on account of the supervening disappearance of conditions of recognition as laid down by international law. In that sense all recognition is conditional and there would appear to be no objection to referring specifically in the act of recogni-

[1] See, with regard to recognition of States, Lauterpacht in *Yale Law Journal*, 53 (1944), pp. 447–9.

tion to such conditions. Thus, for instance, when Great Britain recognized *de jure* the Czechoslovak Government in July 1941, it was stated that "the present Czechoslovak Government will, after the war, at once submit to the regulations of a democratic Czechoslovak constitution."[1] However, conditional recognition as generally understood means recognition the grant or continuation of which is made dependent upon the fulfilment of stipulations other than the normal requirements of statehood, of governmental capacity, or of belligerency. Recognition has occasionally, though not frequently, been granted subject to the new State or government undertaking an obligation such as the concession of most-favoured-nation treatment or of other commercial advantages,[2] settlement of outstanding claims,[3] abstention from and suppression of trade in slaves,[4] respect of private property,[5] proper treatment of minorities,[6] or some line of conduct with regard to a specific situation.[7] It is usual, when such obligations are imposed or entered into as a concomitant of recognition, to speak of conditional recognition. Such terminology, in these and similar cases,[8] is not in keeping

[1] For an Exchange of Notes, bearing on the subject, between Great Britain and Czechoslovakia of 5 Aug. 1942, see *Treaty Series*, No. 3 (1942). See also Taborsky, *The Czechoslovak Cause* (1944), p. 98.

[2] As in the case of the recognition of Albania by the United States in 1922: see Hackworth, I, p. 192. See also *U.S. For. Rel.*, 1922 (i), p. 594.

[3] See, for instance, the various assurances insisted upon by the United States in 1913 with regard to the recognition of the Mexican Provisional Government: Hackworth I, p. 258; or *ibid.*, pp. 261 *et seq.*, with regard to the Obregón Government in 1923.

[4] See Canning's despatch of 15 Feb. 1823, as to the denunciation of the slave trade by Brazil (printed in Webster, *Britain and the Independence of Latin America*, 1812–30 (1938), p. 221). The recognition of the Liberian Government by the United States in 1931 was made to depend "to a considerable extent upon the attitude of Liberia to the report and recommendations of the Committee of Experts appointed by the League with regard to the existence of slavery and forced labour in Liberia": Hackworth, I, p. 306.

[5] See above (n. 3) and Hackworth, I, p. 228, in connection with the recognition of the Bolivian Government by the United States in 1937.

[6] See below, p. 189.

[7] Such as the provisions relating to the permanent neutrality imposed upon Belgium by the Treaty of 15 Nov. 1831, or the provisions of the General Act of the Congo Conference of 1885 concerning freedom of commerce. The relevant Article of the Treaty of 1831 provided as follows: "La Belgique, dans les limites indiquées aux articles 1, 2 et 4, formera un Etat indépendant et perpetuellement neutre. Elle sera tenue d'observer cette même neutralité envers tous les autres Etats." Article 1 of the Congo General Act of 26 Feb. 1885, provided, *inter alia*, that the trade of all nations shall enjoy complete freedom in all the regions forming the basin of the Congo and its outlets. In 1829 and 1830 Great Britain offered to recognize the Government of Dom Miguel in Portugal provided that an amnesty were granted to the former supporters of Queen Maria. The British Government attached importance to stating that that request was not in the nature of a condition of recognition, but that it "was to be considered merely in the light of friendly advice": Smith, vol. I, pp. 176, 178. He suggests that "in substance, if not in form, the proposal was equivalent to an absolute condition"—which probably does not mean a condition in the accepted legal sense.

[8] It is inaccurate to attach literal significance to the expression "conditions" occasionally used in this connection. Thus, for instance, when Germany recognized in 1909 the independence of Bulgaria she referred in her declaration of recognition to the fact of the previous recognition of Bulgaria by Turkey and to the arrangement reached with regard to the Oriental Railway. "Etant donné ces conditions", the declaration proceeded, "le Gouvernement Impérial d'Allemagne . . . est heureux de pouvoir reconnaitre, de son coté le Royaume indépendant de Bulgarie" (Martens, *N.R.G.*, 3rd ser., II, p. 666). This clearly was not a case of conditional recognition. The same applies to the expression "reservations" used in connection with recognition. See, for instance, the statement in the Report of the Committee of Jurists appointed by the Council of the League of Nations in connection with the question of the Aaland Islands to the effect that "the recognition of any State must always be subject to the reservation that the State recognized will respect the obligations imposed upon it either by general International Law or by definite international settlements relating to its territory": *Official Journal*, Special Supplement No. 3 (1920), p. 18. When in March 1922 Great Britain terminated the

with the use of the term "condition" in its ordinary legal connotation.

The so-called conditions, in the instances enumerated above, resemble very little, if at all, any type of conditions accompanying contracts in private law. In practice they have not been intended or treated as conditions in the sense of a vital part of the contract which is discharged by a breach of the condition. Neither have they been treated as an event which, until it materializes, suspends the operation of the contract. As a rule they have formed part of the arrangements accompanying the acts of recognition whenever circumstances have rendered such arrangements advisable. They are often necessary in view of the fact that recognition is frequently preceded by a prolonged period of absence or of suspension of intercourse, with the resulting accumulation of matters requiring a settlement or clarification. When the Soviet Government was recognized in 1933 by the United States it gave, on the basis of reciprocity, certain undertakings and explanations of its future policy with regard to religious freedom and the protection of economic rights of American citizens in Soviet Russia; it also agreed to assign to the United States claims of American citizens against Soviet Russia as the successor of former governments of Russia. These and similar undertakings and assurances have occasionally—and inaccurately—been described as constituting conditional recognition.[1] At times such "conditions" have been in the nature of a partial consideration, either in the interest of the recognizing State or in the general interest, for the act of recognition. To say that is to bring into relief the inappropriateness of so-called conditional recognition and its inconsistency with the true purpose of recognition which is the ascertainment and declaration of the existence of certain factual requirements of statehood, of governmental capacity and of belligerency.[2] Such extraneous conditions are irrelevant to these factual requirements—although in some cases a certain amount of ingenuity may succeed in bringing these stipulations within the orbit of an objective requirement of recognition. Thus it may be said, with regard to recognition of governments, that the insistence on a specific demand, such as the settlement of outstanding claims

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[*Note continued from previous page.*]

protectorate over Egypt and recognized her independence she did so subject to certain reservations, but these were not conditions of recognition making legally possible its withdrawal. When in subsequent years, prior to the Treaty of 1936, difficulties arose between Great Britain and Egypt with regard to some of the reserved points, as, e.g., the status of the Sudan, there was no suggestion on the part of Great Britain that the recognition might be withdrawn.

When in May 1920 Great Britain recognized Danish sovereignty over Greenland she did so subject to the condition that "in the event of Denmark wishing to dispose of the territory she will grant the British Empire the right of pre-emption." The United States thereupon informed Great Britain that they were not disposed to recognize the existence in a third government of the right of pre-emption and reserved their attitude in case a specific proposal for such a transfer should be made in the future: *U.S. For. Rel.*, 1922 (ii), pp. 1, 2. Subsequently, Great Britain modified her attitude. She reserved the right to be consulted should Denmark at any time contemplate the alienation of the territory: Note of 20 May 1920 printed in *P.C.I.J.*, Series C, No. 62, 26th Session, 1933, p. 48.

[1] It was with reference to these various arrangements and undertakings that the Supreme Court said in *United States* v. *Pink* (315 U.S. 203, 229): "Recognition is not always absolute; it is sometimes conditional."

[2] On the other hand, conditional recognition seems to be consistent with the conception of recognition as an act of unfettered political discretion. See, e.g., Scalfati Fusco, *Il riconoscimento di Stati nel diritto internazionale* (1938), p. 266.

or undertakings in the matter of treatment of the nationals of the recognizing State, is no more than the application of the principle that the willingness to fulfil international obligations is a valid requirement of recognition.

However that may be, the imposition of conditions in consideration of recognition is an exceptional occurrence.[1] The very rarity of such stipulations testifies to the fact that the practice of States does not treat recognition as a contract or bargain affording a legitimate occasion for extracting promises and gaining advantages.[2] The impropriety of such attempts has occasionally brought forth protests by the Government affected[3] and has been criticized by statesmen of authority, as was the case in connection with the recognition of Finland in 1919. When the Council of Foreign Ministers at the Peace

[1] Hackworth summarizes the practice of the United States since 1906 by saying that "The United States has not, strictly speaking, accorded conditional recognition to any State" in that period: Hackworth, I, p. 192. He describes—correctly, it is believed—the "two or three" apparent exceptions to that practice as being instances of assurances required coincidentally with recognition: *ibid.* Neither are there any instances of conditional recognition by the United States before 1906. (See Moore, I, § 27.)

[2] The recognition of Lithuania by the decision of the Conference of Ambassadors of 13 July 1922 is an example of conditional recognition. The decision was in the following terms:

> "Les soussignés, représentants de la France, de la Grande Bretagne, de l'Italie et du Japon à la Conférence des Ambassadeurs et dûment mandatés à cet effet, ont l'honneur de faire savoir que les Gouvernements susdits ont décidé de reconnaître de jure le Gouvernement lithuanien, à la condition que celui-ci s'engage à agréer purement et simplement et à observer les dispositions du Traité de Versailles en tant qu'elles concernent le régime de navigation sur le Niemen et, par les présentes, déclarent reconnaître *de jure* le dit Gouvernement sous les conditions susénoncées.
>
> "La présente reconnaissance prendra date et effet du jour de l'accusé de réception contenant l'engagement ci-dessus visé. . . ."

The Lithuanian answer of 4 August 1922 was couched in a somewhat roundabout manner. The assurance was given that the Lithuanian Government, which had signed the Convention and Statute of Barcelona, would observe the arrangements of the Treaty of Versailles in so far as they relate to the Niemen. However, the reply stated that as the above arrangements of the Treaty of Versailles were applicable only in times of peace, the Lithuanian Government was prepared to conform with them as soon as Poland who, notwithstanding her engagements towards Lithuania, was holding parts of Lithuanian territory, shall have permitted Lithuania to establish amicable relations with her and to open the Niemen to free navigation. The Conference of Ambassadors considered that this was not an unconditional acceptance of the recognition. For a time it was intended to send a communication that in view of the Lithuanian reply the recognition could not be regarded as effective. But on 13 October a modified note was sent stating simply that the Lithuanian reply could not be regarded as an "acceptation pure et simple des conditions de 13 Juillet". An opportunity was given to Lithuania to give a more satisfactory answer by way of an explanation "quelle portée le Gouvernement lithuanien attribue aux réserves qu'il a formulées". Lithuania replied on 18 Nov. 1922. The gist of her answer was that as the stipulation in question assumed the existence of a state of peace between the contracting parties and as there existed between Poland and Lithuania a condition approaching that of war, "l'état actuel des relations entre le Lithouanie et la Pologne ne saurait être consideré par le Conférence des Ambassadeurs comme l'état de paix permettant l'application des conventions collectives sur le régime des fleuves internationaux". On 20 Dec., 1922 the Conference of Ambassadors decided to recognize Lithuania *de jure* on the understanding that in so doing it did not express any opinion whether or not such a state of war existed between Lithuania and Poland, whether such a state of war would justify the postponement of the internationalization of the Niemen, or what were the rights and wrongs of Lithuania in her dispute with Poland.

[3] When in 1921 the United States made the recognition of the Obregón Government conditional upon the previous conclusion of a treaty embodying certain principles insisted upon by the United States, Mexico objected on the ground that "the Mexican Republic being a state whose existence and complete sovereignty have not been questioned for a hundred years, its governments have the right to be recognized by the governments of other countries, in accordance with established usage, without other condition than their legality [*sic*] and their capacity to fulfil the international duties and obligations of Mexico." The admissibility of conditional recognition as suggested by Moore (I, p. 73) was asserted to be limited to recognition of States: *U.S For. Rel.*, 1921 (ii), p. 410 (4 June 1921).

Conference in 1919 discussed the question of the recognition of that country, the Japanese representative suggested that recognition should be made dependent upon compliance with certain conditions connected with the military situation in the Baltic, especially in relation to Soviet Russia. Both the British and the American representatives objected to that proposal. Mr. Lansing insisted that ". . . a nation was entitled to recognition of her independence, and her government was equally entitled to recognition as a *de facto* or *de jure* government, as a matter of right, and it was not justifiable to put conditions on such a recognition simply to serve some political purpose."[1]

In the exceptional cases in which a stipulation approaching a condition has been linked with recognition there has been no tendency to assert that it can be withdrawn on the ground that the condition has not been complied with. This view has been expressed in particular with regard to what is perhaps the only important example of conditional recognition, namely, the stipulations of Article 34 of the Treaty of Berlin of 1878 with regard to the treatment of religious minorities in Bulgaria, Serbia, Montenegro and Roumania. On that occasion the language used seems to suggest a condition in the ordinary sense of the term.[2] There has been general agreement that, notwithstanding the terms used, the stipulations in question did not constitute a condition in the strict meaning of the term but a direction known in Roman law as *modus*,[3] and that its effect was merely to confer a right of intervention as distinguished from the right to withdraw recognition.[4]

It thus appears that the term "condition" has been used in relation to recognition in, at least, three senses:

[1] Graham, *The Diplomatic Recognition of Border States*, Part I, Finland (1936), p. 142. Lord Hardinge, who raised the question of the amnesty for the Red Finns who had been fighting as the allies of Great Britain, agreed that a formal stipulation on this question could not be introduced in the document recognizing the independence of Finland. He believed that it would be proper to inform the Finnish Government that the Allies in recognizing the independence of Finland hoped that the Finnish Government would act in a liberal and generous spirit towards the Red Finns: *ibid.*, p. 140. On 5 May 1919 the Foreign Ministers of the United States, Great Britain, France, and Japan agreed that the Governments of the United States of America and Great Britain would forthwith severally recognize the independence of Finland and its *de facto* government and that the "Finnish Government be urged to treat the Red Finns who had fought with the Allies in a liberal and generous spirit by the grant of an amnesty": *U.S. For. Rel*, 1919 (ii), p. 214.

[2] As may be seen from the following passage in the protocol of one of the meetings of the Conference: "Le Prince de Bismarck, aprés avoir constaté les résultats du vote, déclare que le Congrès admet l'indépendance de la Servie, mais sous la condition que la liberté religieuse sera reconnue dans la Principauté. Son Altesse Sérénissima ajoute que la commission de rédaction, en formulant cette décision, devra constater la connexité établie par le Congrès entre la proclamation de l'indépendance serbe et la reconnaissance de liberté religieuse" (*B.F.S.P.*, 69, p. 959; *Archives Diplomatiques*, 1882–3, II, p. 147).

[3] See, in particular, Rivier, *Principes de droit des gens* (1896), vol. I, p. 61; Mérignhac, *Traité de droit public international*, Part I (1905), p. 325.

[4] A gift *sub modo* was an absolute gift with a direction as to how it was to be applied. It has been suggested by Anzilotti (*Corso di diritto internazionale* (3rd ed., 1927), p. 160) that Article 34 of the Treaty of Berlin constituted an agreement between the Great Powers obliging them to recognize the new States on condition that they introduced legislation concerning equality of treatment, and that the obligations of the new States in this matter were grounded not in the Treaty of Berlin but in their subsequent acceptance of the recognition.

In the various Minorities Treaties concluded in 1919 the Preambles to these Treaties linked the question of recognition with that of the acceptance of the provisions concerning the treatment of the minorities. In replying to the Polish objections to the proposed minorities treaty M. Clemenceau said: "This Treaty does not constitute any fresh departure. It has for long

(1) It has been resorted to by reference to the existence of requirements, as laid down by international law, of independent statehood, of governmental capacity and of the qualifications of belligerency in a civil war. Thus, for instance, it is correctly asserted that an authority, in order to be entitled to recognition as a government, must fufil certain objective conditions, in particular that it must enjoy the habitual obedience, properly expressed, of the population of the country. This is not a "condition" in the accepted legal connotation.

(2) It has been employed in connection with the reservation, made concurrently with recognition of certain disputed rights claimed by the recognizing State. This, again, is not a "condition" in the accepted sense of the word.

(3) It has been adopted to describe promises given and obligations undertaken by the recognized State in connection with, and occasionally as an inducement to, recognition in the interest either of the recognizing State or in pursuance of a more general interest. The practice of States shows no instances of such stipulations being treated as giving the right, in case of non-fulfilment, to withdraw recognition. There is accordingly no warrant for regarding them as conditions in the accepted legal sense of the word. However, even when treated as ordinary obligations unrelated to the continued validity of recognition, they are objectionable as being contrary to the true function of recognition. Their main redeeming feature is the rarity of their occurrence.

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been the established procedure of the public law of Europe that when a State is created, or even when large accessions of territory are made to an established State, the joint and formal recognition of the Great Powers should be accompanied by the requirement that such States should, in the form of a binding international Convention, undertake to comply with certain principles of Government". As quoted by Macartney, *National States and National Minorities* (1934), p. 238. It would not be accurate to regard that requirement as a "condition" of recognition. The time may arrive when the proper treatment of minorities and of the individual in general will be regarded as an essential function of statehood as conceived by international law, with the result that conditions of the kind adopted in the Berlin Treaty of 1878 will be in the same category as continued independence or effectiveness of governmental power. See the *Report* of the Mandates Commission to the Council of the League of Nations of 27 June 1931, in which the provision of guarantees concerning the treatment of minorities is suggested as one of the conditions of emancipation of a community from the status of a mandate to that of an independent State: *Minutes*, vol. 20, pp. 228–9. And see Ritsher, *Criteria of Capacity for Independence* (1934).

INTERNATIONAL CIVIL AVIATION AND THE LAW

By R. Y. JENNINGS, M.A., LL.B.
Fellow of Jesus College, Cambridge

THE extraordinary progress of the science of aeronautics during the last four decades is in strange contrast with the halting attempts to develop a public international law of the air adequate for the regulation of this novel means of transport. The present article is an attempt to assess the present state of the law concerning the three fundamental requirements of international civil aviation, namely: the privilege of flight, the privilege of landing, and the privilege of engaging in commerce. It will be convenient to divide the discussion into three main sections: (I) A brief history of the development of the law, and a description of its principal sources; (II) an exposition of the relevant rules of substantive law; (III) general conclusions.

I

During the first decade of the history of the aeroplane (from about the beginning of the present century until the outbreak of the First World War), jurists were still free to speculate on the basic principles of public air law. It was generally agreed that the airspace above the open sea was free, but concerning the airspace over occupied land and over territorial waters there were three principal schools of thought: the first held that this airspace, like the airspace over the open sea, was entirely free; the second held that it was subject to the territorial sovereignty of the subjacent State (though some conceded that this sovereignty was limited by a right of innocent passage for foreign aircraft analagous to the right enjoyed by foreign merchant ships in territorial waters); the third held that there was a lower zone of airspace subject to absolute sovereignty and an upper zone of free airspace.[1] [2] Even before the outbreak of the First World War, however, the practice of States began to harden in favour of unlimited sovereignty over territorial airspaces. During the years 1910 to 1914, national air laws were enacted by a large number of European States; they were without exception restrictive and based mainly on military considerations, for the First World War was already casting its shadow before. In 1911, for example, a British Aerial Navigation Act[3] conferred on the Secretary of State power to exclude foreign aircraft and to make regulations governing their entry into the airspace above British territory. Juridically, the result of the adoption of the theory of unlimited territorial sovereignty was that rights of transit or landing enjoyed by foreign aircraft could only arise from contract or treaty; in Hall's phrase, they were the creatures not of law, but of compact. They could never be real rights, because *pacta tertiis nec nocent nec prosunt*; moreover, being *jura in re aliena*, they must be construed strictly. Politically and economically the result of the adoption of the principle of territorial sovereignty was that

[1] The principal theories are summarized and discussed in Hazeltine, *The Law of the Air* (1911).

[2] The theory of horizontal zones was actually adopted by one State, Peru, in a law of 15 November 1921, now obsolete, which proclaimed freedom of aviation over her territory at altitudes over 3,000 metres.

[3] 1 & 2 Geo. V, cap. 5.

transit and landing facilities became commodities to be bargained for and sold to the highest bidder, the price exacted often having little or nothing to do with civil aviation. The law thus represented the apotheosis of *laissez-faire* in a field where close co-operation and regulation were more than usually desirable.

The first attempt to secure international agreement was at a conference of eighteen European nations convened at Paris in 1910 by the French Government. A treaty was actually drafted, but the Conference, divided mainly over the question of territorial sovereignty, was unable to agree on its adoption and was adjourned *sine die* without reaching any agreement. No further progress was made until after the end of the First World War, when the Paris Peace Conference set up an Aeronautical Commission which produced the *Convention for the Regulation of Aerial Navigation* signed at Paris on 13 October 1919 by the representatives of twenty-six Allied and Associated Governments.[1] The Paris Convention, though considerably less liberal than the draft of 1910, was a great step forward; it enunciated the general principles of international air law, introduced an important measure of uniformity in technical standards and requirements, and created the *Commission internationale de navigation aérienne* (C.I.N.A.) which, among other important functions, has the power to amend by majority vote the technical annexes to the Convention. But hopes that the Convention might become universal were disappointed; it has been ratified by thirty-three States, but the United States, the U.S.S.R., Germany, China, Brazil, Hungary, Turkey, and several smaller States never acceded.[2]

Two further multilateral conventions came into being during the period between the two World Wars. In 1926, when Spain was threatening withdrawal from the League of Nations, the *Ibero-American Air Convention* between Spain and several South American Republics was signed at a conference held at Madrid. The main clauses of the Ibero-American Convention are identical with those of the Paris Convention; the technical annexes, however, are not so comprehensive,[3] and the organization corresponding to C.I.N.A. (the Ibero-American Commission for Air Navigation, or C.I.A.N.A.) was not placed, as C.I.N.A. was in the Paris Convention, under the direction of the League of Nations. Though ratified by Spain, the Argentine, Costa Rica, the Dominican Republic, Mexico, Paraguay, and Salvador, the convention was never put into effect and C.I.A.N.A. was never established. The Ibero-American Convention may now be regarded as

[1] Treaty Series No. 2 (1922). Cmd. 266. The provisions are summarized in Oppenheim, *International Law* , vol. I, 5th ed. (Lauterpacht, 1937), para. 197c. For a more extended treatment see Roper, *La Convention internationale du* 13 *Oct.* 1919 *portant réglementation de la navigation aérienne* (1930).

The original text has been amended by a series of protocols ; in particular the Protocol of 1929 finally removed the remnants of discrimination between the former Allied and Associated Governments on the one hand, and the ex-enemy and ex-neutral States on the other. The last amended text of the Convention is printed in *Official Bulletin No.* 26 of the *Commission internationale de navigation aérienne* (C.I.N.A.).

[2] The following States are now parties to the Convention : Argentina, Australia, Belgium, Bulgaria, Canada, Czechoslovakia, Denmark, Eire, Estonia, Finland, France, Great Britain, Greece, India, Iraq, Italy, Japan, Latvia, Netherlands, New Zealand, Norway, Paraguay, Peru, Poland, Portugal, Rumania, Spain, Sweden, Switzerland, Thailand, Union of South Africa, Uruguay, and Yugoslavia. Paraguay adhered in 1940.

[3] Technical annexes corresponding to Annexes F, G, and H of the Paris Convention were omitted.

obsolete; indeed, two of the principal signatories, Spain and the Argentine, later acceded to the Paris Convention.

More important is the Pan-American Convention on Commercial Aviation, popularly known as the *Havana Convention*; a regional agreement between the Pan-American States, adopted at the Sixth Pan-American Conference held at Havana in 1928.[1] The Havana Convention, primarily a commercial agreement, differs from the Paris Convention in several important respects; in particular, there are no technical annexes, and it did not create a special international organization.[2]

The multilateral conventions, however, form only a part, and in some ways not the more important part of the international law governing civil aviation in the inter-war period. If the multilateral conventions had formed the whole story international civil aviation would have been practically at a standstill, not only because several important States never acceded to the multilateral conventions, but also because vital matters such as the establishment of regular international services were expressly excluded from the terms of those Conventions.[3] International civil aviation was made possible only by the existence of a large number of bilateral agreements, the first of which was concluded as early as July 1913, between France and Germany. The bilateral treaties and agreements are of two main classes. First, there are treaties between two States neither of which is a party to a multilateral convention or only one of which is a party to a multilateral convention, dealing with the general conditions of civil aviation and securing rights of innocent passage on a basis of reciprocity. This class of treaty usually follows closely the text of the Paris Convention, and almost invariably has a clause (corresponding to Article 15 of the Paris Convention) excluding regular services from its terms. It is not unusual to include a form of most-favoured-nation clause.[4] Secondly, there are the so-called

[1] The text is reproduced in Hudson, *International Legislation*, vol. IV, p. 2354. The Convention has been ratified by Chile, Costa Rica, the Dominican Republic, Ecuador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, and the United States. Chile was a party to both the Paris and Havana Conventions until 1936, when she denounced the Paris Convention.

[2] A *Permanent American Aeronautical Commission* (C.A.P.A.=Comision Aeronautica Permanente Americana) was, however, created at the Inter-American Technical Aviation Conference held at Lima in September 1937; its powers and functions are summarized in Mance, *International Air Transport* (1943), p. 20. This Commission had not come into being at the close of 1941.

[3] An attempt was made in Article 5 of the original Paris Convention to boycott non-contracting States by providing that "No contracting State shall, except by a special and temporary authorization, permit the flight above its territory of an aircraft which does not possess the nationality of a contracting State." As early as 1922 it had to be amended to allow contracting States to conclude treaties with non-contracting States granting rights of passage. In the Protocol of 1929, Article 5 was radically amended as follows:

"Each contracting State is entitled to conclude special conventions with non-contracting States.

"The stipulations of such special conventions shall not infringe the rights of the contracting Parties to the present Convention.

"Such special conventions in so far as may be consistent with their objects shall not be contradictory to the general principles of the present Convention.

"They shall be communicated to the International Commission for Air Navigation, which will notify them to the other contracting States."

[4] E.g., Article 1 of the Treaty of 11 May, 1928 between Italy and Austria: "In addition, each of the High Contracting Parties will accord to the other contracting State on conditions of reciprocity the treatment of the most-favoured nation as regards reciprocity in all matters relating to commercial air navigation, subject to the provisions of the last preceding paragraph" (the last preceding paragraph excludes regular services).

"line agreements" which provide for the establishment of individual air lines; it is on this class of agreement that regular, scheduled services depend. In Europe, line agreements are usually made between Governments, although they often refer to particular operating companies (the so-called "chosen instruments"); but in the American continent, agreements between the Government of the State providing facilities and an operating company are common form.[1]

Thus, at the outbreak of the Second World War there were in effective operation two multilateral conventions dealing with the broad problems of international aviation: the Paris Convention of 1919 and the Havana Convention of 1928.[2] There were, however, important States which were parties to neither of the multilateral conventions. Moreover, both conventions were deficient in important respects; in particular, neither made effective provision for the operation of regular, scheduled, commercial services, which consequently were still dependent upon the negotiation of bilateral agreements. This very unsatisfactory state of affairs is well described in the White Paper issued by His Majesty's Government on 18 October 1944:[3]

"Neither of these conventions made provision for international regulation in the economic, as opposed to the technical, field. In the result, the growth of air transport was conditioned by political rather than economic considerations and its development as an orderly system of World communications was impeded. Summed up, the major evils of the pre-war period were, first, that any country on an international air route could hold other countries to ransom even if those operators only wished to fly over or refuel in its territory; secondly, that there was no means of controlling the heavy subsidization of airlines which all too often were maintained at great cost for reasons mainly of national prestige or as a war potential; and thirdly, that the bargaining for transit and commercial rights introduced extraneous considerations and gave rise to international jealousies and mistrust."

It was to deal with this situation, made all the more urgent by the remarkable development of aeronautics during the Second World War, that, on the invitation of the American Government, the representatives of fifty-four States met at the International Civil Aviation Conference opened at Chicago on 1 November 1944. The only notable absentees from the conference were the U.S.S.R. and Saudi Arabia which did not accept the invitations, the Argentine which was not invited, and of course the enemy States. Although there had been much earnest preparatory work extending over the whole of 1944, the Conference had only moderate success. After a difficult session of thirty-seven days, the final meeting was held on 8 December. Five main instruments were adopted:

1. A *Final Act*, including twelve resolutions, signed by all participating States. Unsettled business, including the final drafting of the technical annexes to the new permanent convention, was referred to an Interim Council.
2. A *Convention on International Civil Aviation*, superseding the Paris Conven-

[1] For a more extended treatment of bilateral agreements, see Tombs, *International Organization in European Air Transport and National Policy* (1936), pp. 373–82.

[2] There is, of course, a number of other multilateral conventions dealing with specific topics of air law, such as customs, sanitation, and matters of private law; but these are outside the scope of this article.

[3] Cmd. 6561.

tion of 1919 and the Havana Convention of 1928.[1] Twenty-six ratifications are required, however, before the Convention comes into force.[2]

3. An *Interim Agreement*, dealing mainly with technical matters, and setting up an *Interim Council*, with its seat in Canada. The Interim Agreement comes into force immediately it has been accepted by twenty-six States.

4. An *International Air Transport Agreement*, popularly known as the "five freedoms agreement".

5. An *International Air Services Transit Agreement*, popularly known as the "two freedoms agreement".[3]

II

Sovereignty over territorial airspace. It is symptomatic of the present state of public air law that any discussion of the fundamental privileges of flight over or into the territory of States must begin with a discussion of the principle of sovereignty over territorial airspaces. This now universally recognized principle dominates every aspect of the international law of the air, and every other rule must be read in the light of it. A categorical assertion of the principle appears with monotonous regularity at the beginning of all the treaties, whether multilateral or bilateral. The recently concluded Chicago Convention is no exception; for Article 1 asserts in terms almost identical with the first articles of the Paris and Havana Conventions that:

"The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory."[4]

It will be noticed that this principle is expressed in terms which leave no doubt that it is a statement of the general law; it is "every State", not merely a "contracting State" that has this complete and exclusive sovereignty. Nor is this principle of the general law stated merely as a point of departure for the institution between contracting States of a more liberal régime—a mere harmless assertion of the old law *pour mieux sauter*—for, as we shall see, in each of the treaties, this first article is a statement of the basic principle underlying the provisions of the treaty itself.

The extent of this sovereignty clearly depends upon the definition of "territory". Article 2 of the Chicago Convention, again following its predecessors closely, defines territory in the following terms:

"For the purposes of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State."[5]

Two points of this definition require notice here. In the first place, a State and its possessions are considered to constitute a territorial entity whether they constitute a geographical entity or not; the significance of this rule will become apparent later, in connection with *cabotage*. Secondly, the "complete and exclusive sovereignty" extends not only to the airspace over land areas but also over the marginal seas; in other words, there is no right of innocent passage for aircraft analagous to that enjoyed by merchantmen in territorial

[1] Article 80. [2] Article 91. [3] These two Agreements are discussed below.

[4] See likewise Section 1 of Article VIII of the Chicago *Interim Agreement.*

[5] Cf. para. 2 of Article 1 of the Paris Convention:

"For the purpose of the present Convention the territory of a State shall be understood as including the national territory, both that of the mother country and of the colonies, and the territorial waters adjacent thereto."

waters. Herein lies the only essential difference between the legal status of aircraft and the legal status of shipping. Protagonists of the free air school have often argued from the supposed analogy of the freedom of the seas, but in truth the argument does not take us very far; or to be exact it takes us only three miles farther. For there can be little doubt that the airspace over the open sea is as free to the aircraft of all nations as the waters of the open sea are free to their shipping.[1] But whereas shipping enjoys a customary right of innocent passage through territorial waters and of access to ports, aircraft have no analogous privileges. This is not a question of a difference between the sea and the air, but between shipping and aircraft. A seaplane has no more right to taxi over territorial waters into a port than it has to fly into the port. Nor is this difference of treatment at all surprising, for where security is the prime factor there is little analogy between the slow, restricted movement of the merchant vessel and the fast, unrestricted movement of the aircraft. The practice of States does not even warrant any suggestion that there is, apart from treaty arrangements,[2] any right of innocent passage for aircraft over territorial straits. The conventions draw no distinction whatever between the legal régime of the airspace over land and the airspace over territorial waters.

Transit and landing rights. In one of the principal clauses of the Paris Convention, each contracting State "undertakes in time of peace to accord freedom of innocent passage above its territory to the aircraft of other contracting States".[3] Considering that this is the operative clause of the convention, the language may be said to be sparse. Whatever may be the meaning of "innocent" in this context,. it is clear that freedom of passage does not necessarily include the freedom to land. Moreover, the first paragraph of Article 15 provides that: "Every aircraft of a contracting State has the right to cross the airspace of another State without landing. In this case it shall follow the route fixed by the State over which the flight takes place. However, for reasons of general security it will be obliged to land if ordered to do so. . . ." The only sure proposition to be drawn from this provision is that an aircraft may be obliged to land, and again it does not necessarily follow that an aircraft has the freedom to land at its own discretion. In the absence, therefore, of a clear provision of the convention conferring the freedom of landing it must be assumed that the municipal law holds good and that landing rights remain within the discretion of the State concerned.

The second paragraph of Article 2 provides that:

"Regulations made by a contracting State as to the admission over its territory of the aircraft of other contracting States shall be applied without distinction of nationality."

The intention of the clause is the entirely laudable one of prohibiting discrimination disguised as administrative regulation. It is, however, capable of being interpreted to mean that States have *carte blanche* to impose any conditions they please on the admission of aircraft to their territory, and a

[1] Oddly enough, the Conventions do not mention the airspace over the open sea; but this in itself provides indirect authority for the rule, for if airspace over the open sea were not free, conventions designed to secure rights of transit would surely deal with the matter.

[2] See, e.g., Article 23 of the Montreux Straits Convention, 20 July, 1936.

[3] Article 2.

few States have used the clause, not without a colour of right, to justify national regulations requiring individual authorization for every flight of a foreign aircraft over or into their territory. This interpretation, which has very properly incurred the displeasure of the International Commission for Air Navigation, would render the first paragraph of Article 2 almost nugatory.[1]

In spite, however, of lacunae and of obscurities which tempt illiberal interpretation, these clauses would of themselves go some part of the way towards securing the fundamental privileges required by international air transport. Unfortunately, they are so hedged round with limitations and exceptions as to weaken them almost to vanishing point. Of emergency restrictions, prohibited zones, and cabotage, it will be necessary to say something later, but the most important exception, the exclusion of scheduled services from the transit clauses, calls for immediate comment, for it lies at the heart of the problem.

Scheduled services. Article 15, of the Paris Convention excludes "international airways" (by which is meant regular, scheduled, international services) from the freedom of passage accorded in Article 2, by providing that such services shall be subject to the consent of the States flown over. No reasons need be given for the refusal of consent; it is not even required that authorization for regular services shall be granted without distinction of nationality. There remains, therefore, an emasculated transit clause limited in its application to casual private flying and to taxi services; this class of flying is not unimportant, but it is precisely in the much more important field of scheduled international services that there is urgent need for an international legal régime, and it is here that Article 15 refers the question back to the principle of territorial sovereignty asserted in Article 1, with the result that scheduled international services have maintained only a precarious existence dependent on the negotiation of numerous bilateral agreements.[2] A notorious recent example of the working of Article 15 was the refusal of Spain from 1935 until the spring of 1940 to authorize a British line to cross Spanish territory *en route* to Portugal; by that time the increased range of aircraft had made the authorization no longer necessary.

The last paragraph of Article 15 as drafted in the original Treaty of 1919 simply provided that "the establishment of international airways shall be

[1] Regulations made by States under para. 2 of Article 3 are summarized in *Annex C, Minutes,* of 21st Session of C.I.N.A. at Rome in 1933.

See also C.I.N.A. *Official Bulletin,* No. 23 (1935), Resolutions Nos. 813 and 814, at p. 88, which admit that prior notice of flight may be required "for imperative reasons". C.I.N.A. was not prepared to admit that the requirement of prior authorization was permitted by the Convention, but only "for reasons arising out of the peculiar situation of certain countries."

[2] The *Havana Convention,* being primarily a commercial agreement, does provide for scheduled services in Article 21:

"The aircraft of a contracting State engaged in international air commerce may discharge passengers and cargo at any airport designated as a port of entry of any other contracting State and may also proceed to any other airport in such State to set down or take up passengers and cargo in international traffic, provided that they comply with local laws and regulations, which, however, must be the same for native and foreign aircraft engaged in international traffic."

It is not clear, however, whether this article was intended to dispense with prior authorization for scheduled services or not. The United States and Mexico, for example, have continued to regard prior authorization as necessary, and, accordingly, scheduled services have in practice been maintained by bilateral agreements.

subject to the consent of the States flown over". There was at first some dispute about the scope of this provision. We have seen that the first paragraph of the same article provides that *every* aircraft of a contracting State has the right to cross the airspace of another contracting State without landing. Therefore, it may very well be argued, the special authorization required in the last paragraph applies only to the establishment of international airways which require landing facilities, and no special authorization is required for the establishment of international airways which merely cross the territory of a State without landing. Otherwise, indeed, it is difficult to see why paragraph 1 of Article 15 was inserted, for it then adds nothing to the innocent passage clause of Article 2. This liberal interpretation was pleaded by the British delegate at the special session of the International Commission for Air Navigation in 1929 and received the support of the Netherlands, Sweden and the United States (the latter being present by special invitation, though not a party to the Convention), but the British proposal was defeated by twenty-seven votes to four, and Article 15 was thereupon amended in such a way as to leave no possible doubt that it excluded all scheduled services from the transit clauses of the Convention.[1]

There has been much speculation on methods whereby the worst abuses of the rampant nationalism embodied in the amended Article 15 might be checked. Indeed, the delegates at the 1929 Session of C.I.N.A., sensing perhaps that they had gone far towards making a mockery of the most important clause of the convention, went on to pay lip service to the idea of free air by "recommending" that the necessary authorization for the establishment of regular air lines should not be refused except on "reasonable grounds".[2] This is, of course, little more than a pious hope, but attempts have been made by jurists to import a sanction by means of the doctrine of the "abuse of rights".

Abuse of rights. This doctrine is now established as a part of international law, and offers a proper juridical basis for checking the anti-social exploitation of the sovereign rights of States over their territorial airspaces by weighing the national advantage against the international disadvantage.[3] In practice, however, there are serious limitations on the effectiveness of the doctrine when applied to this particular problem. The principle of the abuse of rights is merely a legal technique for enforcing current notions of morality and

[1] The text of para. 4 of Article 15 as amended by the 1929 Protocol was:

"Every contracting State may make conditional on its prior authorization the establishment of international airways and the creation and operation of regular international air navigation lines, with or without landing, in its territory."

[2] See Resolution No. 487 of 16th (Extraordinary) Session of C.I.N.A. (*Official Bulletin* No. 16, Nov. 1929, at p. 30):

"The Commission decides to call the attention of the Governments of the Contracting States to the spirit in which the Conference has framed the new text of the fourth paragraph of Article 15 of the Convention, and to recommend to such Governments that they do not refuse the authorization provided for in the said paragraph except on reasonable grounds."

This formula was introduced into bilateral agreements between the United States and Sweden (1933), United States and Norway (1933), and United States and Denmark (1934), all of which provided that authorization for scheduled services "may not be refused on unreasonable or arbitrary grounds".

[3] See Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), pp. 112–16, and Lauterpacht, *The Function of Law in the International Community* (1932), pp. 301–3, and Chap. XIV *passim*.

justice. It has no inherent content; the content must be supplied by the public opinion of the community in which it is applied. Thus, if a State refuses to authorize an international airway over its territory, it is only possible to speak of an abuse of right if the refusal is one that is condemned by the general opinion of other States. The fact is, however, that States seem to be agreed that each one of them has an absolute discretion in this matter; not only are no reasons for refusal condemned, but it seems to be agreed that no reason for refusal need be given. The *ipse dixit* of the State is sufficient. Whilst this temper remains there seems little likelihood that the principle of the abuse of rights will have any place in international air law outside the text-books. Just as there is little room for a doctrine of abuse of rights in an individualistic common law, so it also seems to have little relevance in an international air law whose fundamental principle is "complete and exclusive" sovereignty over territorial airspaces. Indeed, if the temper of States does become more liberal it seems likely that modification of the law could be brought about more satisfactorily by the conclusion of a more liberal general treaty rather than by the infiltration of a principle peculiarly appropriate to the slow processes of judge-made law. Furthermore, the principle would at best only touch the fringe of the problem, for *ex hypothesi* it applies only to the more extravagant exercises of sovereignty.

Problems and proposals at Chicago. The important and comprehensive measure of agreement reached on technical and ancillary matters in the Paris Convention is in strong contrast with the weakness of the articles dealing with the essential conditions of international aviation, namely, transit and landing rights. This is not surprising, for it is here that civil aviation touches most nearly on the vital political and economic interests of States. The problem is made the more complex by the variety of these interests: there are obvious differences, for example, between the interests of operating States, and States providing facilities; between Imperial powers with ocean empires, and States with vast metropolitan territories; between States lying astride the great air routes of the world, and States which can only hope to attract branch lines. These geographical, political, and economic differences are made the more acute by the potentialities of civil aviation as an instrument of power and domination in the hands of the big operating States.

It is scheduled international services which raise these differences of interest in their most acute form. As we have seen, this aspect of the problem was solved, or rather shelved, at Paris, by the simple method of excluding this form of aviation from the benefit of the transit clauses of the Convention. This exclusion had the further result of obscuring the fundamental inadequacy of these transit clauses.[1] Thus if Article 15 of the Paris Convention were discarded it would at once become apparent that the transit clauses of the Convention would require very considerable elaboration, for they fail to make distinctions necessary to the regulation of commercial aviation. To grant a right of innocent passage to scheduled international services would be

[1] The extraordinary lack of elaboration in international air law was commented on in 1930 by the League of Nations Communications and Transit Committee; see League of Nations *Official Journal*, December 1930, p. 1857.

something; but once it is proposed that scheduled services may also land, there at once arises the question of the purposes for which they may or may not land, and a distinction must at least be drawn between landing for non-traffic purposes and landing to pick up or set down passengers and freight. In the final analysis, five distinct rights are involved. In the public discussions prior to the Chicago Conference these rights were popularized under the name of the "five freedoms", though they would more properly be called the five privileges.

The five freedoms or privileges which must be considered are:

1. The right of innocent passage through a State's air space;
2. The right to land for non-traffic purposes (refuelling, emergency, &c.);
3. The right to disembark passengers, mails, and freight from the country of origin of the aircraft;
4. The right to embark passengers, mails, and freight destined for the country of origin of the aircraft;
5. The right to pick up and set down traffic to and from places which are not in the country of origin of the aircraft.

The task of the Chicago Conference was therefore to find an acceptable formula which would secure all or some of these so-called freedoms. The United States delegation strongly supported complete freedom of the air, leaving the exploitation of this new freedom to unrestricted competition between national airlines. The history of the Paris Convention, however, demonstrated that freedom of the air was not likely to find acceptance unless coupled with some machinery which would safeguard those national political and economic interests represented in the present régime by territorial sovereignty and its corollary of national self-determination in the air. Australia and New Zealand, going to the other extreme, pressed for full international control and operation of international airways; the discussion of the practicability of this radical proposal is not within the scope of this paper, but certain legal difficulties will be noticed below. Midway between the two extremes was the very interesting Canadian draft convention.[1] This would have granted the first four freedoms, coupled with a compensating control of air line frequencies by an international body which would allot frequencies to national airlines according to an agreed formula.[2] This body, called the Board of Directors, was to be the executive committee of the International Air Assembly. It would allocate frequencies on the basis of consumer preference. The formula suggested was that any line would have an inalienable right to increase its frequencies when, for a substantial length of time, more than 65 per cent. of its total available capacity had actually been occupied by revenue-paying commercial load; conversely that any line must suffer a diminution of its allotted frequencies if, for a substantial length of time, the proportion of revenue-paying commercial load remained less than 40 per cent. This ingenious proposal had the merit of maintaining a con-

[1] Tabled in the Canadian House of Commons by Mr. C. D. Howe on 17 March 1944.

[2] This was not, of course, a new idea. In 1930, the Air Transport Co-operation Committee of the League of Nations recommended "(*a*) The selection by inter-governmental agreement of qualified enterprises and the specification of traffic conditions" (Doc. C.395. M.175. 1930 VIII).

siderable element of healthy competition within the framework of control.[1] A similar organization was also envisaged, though not so rigidly defined, in the White Paper issued by His Majesty's Government on 18 October 1944.[2]

The Chicago Convention. The outcome of the Conference is well known. The United States delegation, firmly wedded to the doctrine of unrestricted competition, was unable to agree to the proposals for the international regulation of frequencies, while the States providing facilities were unable to agree to a freedom of the air which would leave them at the mercy of the most powerful operator State. Consequently, the transit and landing clauses of the Chicago *Convention on International Civil Aviation* do not differ radically from those of the Paris Convention. The drafting is improved, certain matters which were obscure in the earlier Convention are made clearer, and dangerous ambiguities are avoided; nevertheless, the net result is much the same as in the older Convention.

By Article 5 of the Chicago Convention, each contracting State grants to aircraft not engaged in scheduled international services the right "to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission, and subject to the right of the State flown over to require landing." This is an advance on Article 2 of the Paris Convention in that it avoids the ambiguous phrase "innocent passage", and provides explicitly for landing as well as transit, making it clear that prior authorization may not be required for either transit or landing for non-traffic purposes. A distinction is drawn, however, between landing for non-traffic purposes, for which prior authorization is not required, and landing of aircraft carrying "passengers, cargo, or mail for remuneration or hire". The latter class of aircraft, unless engaged in scheduled services, and subject to cabotage, "have the privilege of taking on or discharging passengers, cargo or mail, subject to the right of any State where such embarkation or discharge takes place to impose such regulations, conditions or limitations as it may consider desirable". The language of this provision is so wide as practically to give contracting States a free hand in regulating the entry into their territories of an important class of commercial aircraft, even though not engaged in scheduled services.

Article 5, it will be noticed, carefully excludes scheduled international

[1] This part of the Canadian proposal was undoubtedly inspired by the successful working of the United States *Civil Aeronautics Board*, established by the *Civil Aeronautics Act* 1938, to regulate competition between airlines of the United States. It is an administrative and quasi-judicial authority which sanctions the establishment or abandonment of both international and inter-state airlines by issuing certificates of public convenience and necessity. It also fixes rates, and its approval is required for all pooling and interlocking agreements.

[2] Cmd. 6561. The draft convention proposed in this White Paper was, after securing the first four freedoms, to

"(iii) define the international air routes which should be subject to international regulation; these would be reviewed from time to time as necessary;

"(iv) provide for the elimination of uneconomic competition by the determination of frequencies (total services of all countries operating on any international route), the distribution of these frequencies between the countries concerned, and the fixing of rates of carriage in relation to standards of speed and accommodation;

"(v) to provide for the licensing of international air operators who undertook to observe the convention and to abide by the rulings of the appropriate authority, and for the withdrawal of the licence in the event of a breach of the obligations;

"(vi) to provide for the denial of facilities to any unlicensed operators."

services from all the benefits granted to other categories of aircraft. Article 6 makes assurance doubly sure by stating categorically that "no scheduled international air-service may be operated over or into the territory of a contracting State, except with the permission or other authorization of that State, and in accordance with the terms of such permission or authorization". The language is even stronger than that of the amended Article 15 of the Paris Convention; the latter was permissive, the new provision is imperative.

Thus, the main Chicago Convention leaves the law concerning transit and landing privileges substantially where it was before, mainly because of the impossibility of reaching agreement on any alternative proposals. In addition to the main Convention, however, two supplementary agreements were left open for signature by States which might be prepared to go further along the road towards freedom of the air.

The Chicago Transport and Transit Agreements. An *International Air Transport Agreement*, designed very largely by the United States delegation and conveniently known as the "five-freedoms agreement", secures all five freedoms to scheduled international services, the grant of the last three freedoms, however, relating only to through services on a route constituting a reasonably direct line out from and back to the homeland of the State whose nationality the aircraft possesses. [1] [2] The five-freedoms Agreement has been signed by nineteen States, the Netherlands and Turkey signing with reservations. It goes far towards securing freedom of the air, but is not likely to find wide acceptance among the principal States providing facilities or by the British Empire. A few days before the Conference ended, however, the Netherlands delegate made a compromise proposal for a two-freedoms agreement styled the *International Air Services Transit Agreement.* This is a truncated version of the five-freedoms agreement, being designed to secure the first two freedoms to scheduled international services. It proved more popular than the more radical American proposal, and by 20 February 1945 it had been signed by thirty-three States, including all the great Colonial powers except Portugal, and all the great operator or transit States except Australia, China, and Brazil (and, of course, the U.S.S.R., which was not a party to the Conference).

[1] Article 1, Section I:

"Each contracting State grants to the other contracting States the following freedoms of the air in respect of scheduled international air services:

(1) The privilege to fly across its territory without landing;

(2) The privilege to land for non-traffic purposes;

(3) The privilege to put down passengers, mail and cargo taken on in the territory of the State whose nationality the aircraft possesses;

(4) The privilege to take on passengers, mail and cargo destined for the territory of the State whose nationality the aircraft possesses;

(5) The privilege to take on passengers, mail and cargo destined for the territory of any other contracting State and the privilege to put down passengers, mail and cargo coming from any other territory.

With respect to the privileges specified under paragraphs (3) (4) and (5) of this Section, the undertaking of each contracting State relates only to through services on a route constituting a reasonably direct line out from and back to the homeland of the State whose nationality the aircraft possesses."

[2] A State may, by reservation made at signature or acceptance, elect "not to grant and receive the rights and obligations" of the fifth freedom, or may, even after acceptance, on the expiry of six months' notice to the Council, withdraw from these rights and obligations, or resume these rights and obligations: Article IV, Section I.

Both these agreements contain a clause providing that, within certain limits, a State granting to the airlines of another contracting State the privilege of stopping for non-traffic purposes may require those air lines to offer reasonable commercial services at the points at which such stops are made.[1] Apparently some annoyance has been caused in the past when air lines have sometimes used the territories of intermediate States purely for their own convenience, for example as refuelling stages, while refusing to perform small services in return, such as the carriage of an occasional important passenger or light freight, even when there has been room on the aircraft. This provision therefore allows a contracting State to make the grant of facilities for non-traffic purposes conditional on the reasonable performance of such occasional services, provided the qualifications set out in the second paragraph of the provision are observed.

It is evidently intended that both these Agreements may continue to operate, within certain limits, even during a war. Almost all other treaties and conventions, multilateral or bilateral, have a so-called "peacetime clause", under which contracting States reserve complete freedom of action in time of war, whether as neutrals or belligerents.[2] The clauses are widely drawn and can be interpreted to mean that if a war between State A and State B affects State C, State C is at liberty to suspend its obligations under the conventions towards State D.[3] One important aspect of the peacetime clause is that it might assist an aggressor State by hampering the communications of States endeavouring to keep the peace, at a time when rapidity of action is vital. The two Chicago Agreements, however, do not have a peacetime clause, but provide instead that the privileges granted shall not apply to airports "utilized for military purposes to the exclusion of any[4] scheduled international air services", and that in "areas of active hostilities or of military occupation, and in time of war along the supply routes leading to such areas, the exercise of such privileges shall be subject to the approval of the competent military authorities".

It is significant that although the Conference was unable to agree on the major proposal for the international control of frequencies, it was nevertheless found necessary in each transit agreement to invest the International Civil Aviation Organization with quasi-judicial powers to deal with cases where action by one contracting State taken under either Agreement causes injustice or hardship to another.[5] The aggrieved State may call upon the

[1] Article 1, Section 3, of both Agreements reads:

"A contracting State granting to the airlines of another contracting State the privilege to stop for non-traffic purposes may require such airlines to offer reasonable commercial service at the points at which such stops are made.

"Such requirement shall not involve any discrimination between airlines operating on the same route, shall take into account the capacity of the aircraft, and shall be exercised in such a manner as not to prejudice the normal operations of the international air services concerned or the rights and obligations of a contracting State."

A "stop for non-traffic purposes" is defined in Article 96 (d) of the main Convention as "a landing for any purpose other than taking on or discharging passengers, cargo or mail".

[2] An exception is the treaty between the United States and Canada of 29 August 1929.

[3] The analogous clause of the main Chicago Convention goes further, and allows freedom of action to a contracting State "which declares a state of national emergency and notifies the fact to the Council"; Chap. XIX, Article 89.

[4] "Any" is curiously ambiguous in this context; does it mean "any one" or "all"?

[5] See Article II, Section 1, of the "two freedoms agreement" and Article IV, Section 2, of the "five-freedoms agreement"; the two provisions are similar.

Council of the I.C.A.O. to examine the situation. The Council must then call the States concerned into consultation. If the difficulty remains unresolved the Council may then make appropriate findings and recommendations. If, thereupon, a State in the opinion of the Council unreasonably fails to take "suitable corrective action" the Council may recommend to the Assembly of the I.C.A.O. that the recalcitrant State "be suspended from its rights and privileges under the Agreement until such action has been taken", and this the Assembly may do by a two-thirds vote,[1] the suspension being for such time as the Assembly may deem proper or until the Council finds that corrective action has been taken.

Prohibited areas and emergency restrictions. By Article 3 of the Paris Convention, contracting States are permitted "for military reasons or in the interest of public safety" to prohibit aircraft from flying over certain areas of their territory. These zones are to be prohibited equally to the State's own private aircraft and those of other contracting States, but even this mitigation was weakened almost to vanishing point by the 1929 Protocol, which added the gloss that a contracting State might "as an exceptional measure and in the interest of public safety, authorize flight over the said areas by its national aircraft". The position and extent of prohibited areas, as well as any "exceptional authorizations" are to be previously published both to other contracting States and to the International Commission for Air Navigation. Before the outbreak of the Second World War the European continent had become littered with prohibited zones; indeed, in many frontier areas (for example the Franco-German frontier, and the north Italian frontier) the prohibited zones were so extensive that only a few narrow corridors remained open, thus necessitating long and even dangerous detours. It has even happened that the frontier corridors laid down by neighbouring States were not contiguous, with the result that the frontier was virtually closed to air transport.

The 1929 Protocol added yet another clause to Article 3, permitting a State even in time of peace, "in exceptional circumstances" undefined, "with immediate effect temporarily to restrict or prohibit flight over its territory or over part of its territory", provided such restriction or prohibition is made without distinction of nationality.[2] C.I.N.A. has passed resolutions pleading for reasonableness in the establishment of prohibited zones, but these had little effect in a Europe already preoccupied with rearmament.[3]

[1] Note, however, Article 66 of the main Convention:

> "(*b*) Members of the Assembly and the Council who have not accepted the International Air Services Transit Agreement or the International Air Transport Agreement drawn up at Chicago on 7 December, 1944, shall not have the right to vote on any questions referred to the Assembly or Council under the provisions of the relevant Agreement."

[2] This clause of Article 3 was used in 1935 at the time of the Saar plebiscite to restrict flying over the Saar Territory.

[3] See C.I.N.A. *Official Bulletin* No. 23 (1935), p. 93, Resolution 828:

> "The Commission, desirous of favouring as far as possible the development of international air navigation, recommends the contracting States:
>
> 1. Only to exercise the powers recognized in Article 3 of the Convention to the minimum extent compatible with their interests;
>
> 2. To endeavour in taking decisions with regard to the location and extent of prohibited areas to incommode navigation to the minimum extent possible;
>
> 3. To make, in the light of the foregoing principles, a review of the areas of their territory over which flight by aircraft is prohibited."

Article 9 of the Chicago Convention allows contracting States to establish prohibited or restricted areas, but it differs in certain important respects from the analogous provisions of Article 3 of the Paris Convention. The areas may be established "for reasons of military necessity or public safety"; military "necessity" is a good deal stronger than the military "reasons" of the Paris Convention. Moreover, Article 9 requires that prohibited areas "shall be of reasonable extent and location so as not to interfere unnecessarily with air navigation", a clause obviously inspired by the 1935 Resolution of the International Commission for Air Navigation. Furthermore, Article 9 provides that the prohibitions or restrictions shall be applied uniformly to the aircraft of other States and that no distinction may be made "between the aircraft of the State whose territory is involved, engaged in international scheduled airline services, and the aircraft of other contracting States likewise engaged", a clause obviously meant to ensure as far as possible that prohibited or restricted areas shall not be established with an eye to commercial advantage.

The clause of the 1929 Protocol permitting as an exceptional measure the flight of national aircaft over prohibited areas has no parallel in the Chicago Convention. The second paragraph of Article 9, however, permits the emergency restriction or prohibition of the flight of foreign aircraft in language almost identical with that of the 1929 Protocol.[1]

Cabotage. It is usual in both multilateral conventions and bilateral agreements to include a clause by which each contracting State reserves all traffic between places within its own territory to its national aircraft. This reservation is commonly called *cabotage.* The term is, of course, borrowed from maritime law, but as so often happens when air law seeks an analogy in maritime law the analogy is misleading, for cabotage in air law resembles cabotage in maritime law only superficially. Cabotage in maritime law is coastal-trading between places which are not only within the territory of the same power, but are also within the same geographical entity:[2] the cabotage of air law is much more extensive, for the conventions define "territory" as including not only the metropolitan territory but also colonies, mandated territories, and the like,[3] and therefore cabotage here includes all traffic between places within the whole territory of a contracting State, including its colonial empire.[4] Furthermore, air and maritime cabotage are not only different in extent, but also in kind. Maritime cabotage is an exception to the general rule of the freedom of the seas: air cabotage is merely

[1] Article 9 of the Chicago Convention is as follows:

"(*b*) Each contracting State reserves also the right, in exceptional circumstances or during a period of emergency, or in the interest of public safety, and with immediate effect, temporarily to restrict or prohibit flying over the whole or part of its territory, on condition that such restriction or prohibition shall be applicable without distinction of nationality to aircraft of all other States."

[2] Oppenheim, *International Law,* 5th ed. (Lauterpacht, 1937), para. 187.

[3] Article 1 of the Paris Convention; Article 2 of the Chicago Convention.

[4] Note, however, that in both the Paris and Chicago Conventions the unit is the territory of "each *contracting* State". The United Kingdom, the five Dominions, and India are separate contracting parties to each convention, and they have separate votes in C.I.N.A. It follows that, while traffic between the U.K. and a British colony, mandated territory, or protectorate is cabotage, traffic between the U.K. and a Dominion, or India, is not. Thus, traffic between Amsterdam and Batavia is covered by the cabotage clause, but traffic between London and Karachi is not.

a part of the larger right of sovereignty over territorial airspaces. Thus, in air law, cabotage is no more than a convenient description for certain territorial rights which States customarily reserve to themselves in treaties which otherwise grant transit or landing rights to other contracting States; cabotage in air law is a clause of a treaty, and cannot be defined except in terms of a particular clause of a particular treaty.

The cabotage clause is a very serious limitation. It can be used by a colonial power to establish a virtual monopoly even in services involving intermediate stops in foreign territory, provided that the beginning and end of the journey are within the territory of the same power. The cabotage clause of the Paris Convention[1] caused a good deal of criticism, and at its 1934 session the International Air Navigation Commission recommended contracting States "to invoke Art. 16 of the Convention only with extreme reserve and with care to safeguard to the greatest extent possible the spirit of liberty and equality of treatment contained in the Convention". Nevertheless cabotage is again reserved in Article 7 of the Chicago Convention, though the second paragraph of this article does limit the exploitation of cabotage as a bargaining counter by adding a form of most-favoured-nation clause.[2]

Registration and nationality of aircraft. The enjoyment of the privileges secured in the Conventions is not conferred upon aircraft in general, but is granted exclusively to the "aircraft of contracting States". The conventions are unanimous on the principles governing the legal nexus between aircraft and a contracting State: aircraft have the nationality of the State in which they are registered;[3] the conditions for the registration of aircraft in a State are exclusively within the competence of the municipal law of that State;[4]

[1] Article 16: "Each contracting State shall have the right to establish reservations and restrictions in favour of its national aircraft in connection with the carriage of persons and goods for hire between two points on its territory."

The 1938 Protocol modifies the wording of Article 16 as follows: "Each contracting State shall have the right to establish reservations and restrictions in favour of its national aircraft in connection with the carriage of persons and things by aircraft between two points in its territory:

(*a*) For hire or reward (of any nature whatsoever);

(*b*) Even without remuneration, if the transport is effected by an air transport undertaking, the transport necessary for the proper working of the air services which it carries out."

[2] Article 7:

"*Cabotage.*

"Each contracting State shall have the right to refuse permission to the aircraft of other contracting States to take on in its territory passengers, mail and cargo carried for remuneration or hire and destined for another point within its territory. Each contracting State undertakes not to enter into any arrangements which specifically grant any such privilege on an exclusive basis to any other State or an airline of any other State, and not to obtain any such exclusive privilege from any other State."

Section 4 of Article 1 of the "five-freedoms" transit agreement is exactly similar.

[3] Article 6 of the Paris Convention; Article 17 of the Chicago Convention.

[4] Article 7 of the Paris Convention; Article 19 of the Chicago Convention.

Originally Article 7 of the Paris Convention laid down that no aircraft could be entered on the register of a contracting State unless it belonged wholly to nationals of that State or to a national company of which the President and Chairman and not less than two-thirds of the directors were nationals of that State. This original draft was, of course, designed to prevent Germany from regaining a foothold in international civil aviation by operating through aircraft registered in another State. In the Protocol of 1929, largely on German insistence, the Article was amended to its present form, making registrations solely a matter for the municipal law.

an aircraft cannot be registered in more than one State;[1] and every aircraft engaged in international aviation must bear its appropriate nationality and registration marks.[2] Thus in this crucial matter of registration and nationality the Conventions do little more than record the abdication of international law in favour of the municipal law of the contracting States; an abdication which merely carries the principle of territorial sovereignty to its logical conclusion by allowing a State complete discretion in defining those aircraft which will be given precedence in its own territorial airspace.

The registration of aircraft is clearly necessary for the administration of the Conventions, for if aircraft are to come under the terms of a convention there must be some machinery for identification and for establishing responsibility. The practice of most States, however, is to require that, in order to qualify for registration, an aircraft must be owned by nationals or by a national company. Narrow requirements of this kind clearly do not facilitate the administration of the Conventions, for by lease, hire, mortgage, and the like, the ownership of an aircraft may become remote from its effective control and operation, thus leading to a separation of administrative competence in law and administrative competence in fact. It has sometimes been suggested, therefore, that the concept of nationality is an unnecessary intrusion into air law; for mere registration, divorced from the narrow requirements of nationality, is sufficient for all administrative purposes, and an aircraft which finds itself in a State other than its State of registration is in no more need of the trappings of nationality than a motor-car is. In fact, however, the rules governing the nationality of aircraft are in accordance with realities. Aircraft are not analogous to motor-cars, for the reason that air transport is regarded by States as an instrument of national policy. The conferment of nationality on aircraft is a claim to control and jurisdiction over them wherever they may be and this claim cannot be disposed of merely by pointing out that States do not make equally extensive claims over their registered motor-cars; the point is that they do make the claim over their registered aircraft, and the claim embraces economic, political, and financial considerations of the highest importance. It is idle to suppose that a concept as powerful as nationality can be disposed of merely by demonstrating that the Conventions could be more conveniently administered without it.

The position must therefore be accepted that a State will regard its registered aircraft as clothed with the nationality of that State and will jealously guard its discretion in deciding the conditions under which that status will be conferred. The important point, however, that emerges from these rules is that the Conventions make no provision whatever for any category of aircraft other than the national aircraft of a contracting State. It is evident that this outlawry of all but national aircraft raises fundamental legal difficulties in the way of any proposal to internationalize civil aviation if by that is intended something more than a mere pooling of national aircraft. The problem of providing a status for other than national aircraft is not remote, for though the operation of world airlines by a world organiza-

[1] Article 8 of the Paris Convention; Article 18 of the Chicago Convention.

[2] Article 10 of the Paris Convention; Article 20 of the Chicago Convention. Machinery is also provided for the publication of registrations; see Article 9 of the Paris Convention and Article 21 of the Chicago Convention.

tion may perhaps be dismissed as visionary, international agencies for the operation of aircraft within a more restricted field have already begun to emerge. Even before the Second World War, side by side with the law based on orthodox national sovereignty, there had developed, for the most part informally, numerous international undertakings and pooling arrangements between operating companies.[1] It is true that subsidiary or holding companies provide a machinery sufficiently flexible to bring the instrumentalities of these organizations within the definition of "aircraft of a contracting State", but sooner or later the status of the aircraft of an international agency must be faced, and it will require the devising of new law. The Chicago Conference was evidently aware of the problem, but cannot be said to have provided a solution in Article 77 of the Convention which enjoins the Council to "determine in what manner the provisions of this Convention relating to nationality of aircraft shall apply to aircraft operated by international operating agencies".

The present outlawry of all but national aircraft raises serious problems that are not by any means confined to commercial aviation; there is also the question of the position of civil aircraft used in the service of an international security organization, which are likewise excluded from the benefits of the multilateral conventions. This problem caused much concern to the League of Nations, and in 1926 the Council of the League requested the Advisory and Technical Committee on Communications and Transit to investigate the problem. The Committee, in turn, sought the advice of C.I.N.A., which advised that "the best procedure for ensuring to aircraft of the League of Nations, the possibility of flying freely, even at times of emergency, over the territory of States parties to the Convention of October 13th, 1919, consists in inserting provisions to that effect in the said Convention".[2] In short, new law must be devised, for the existing law provides no status whatever for any but national aircraft of a contracting State.

III

It will be evident from the above that the basic principle of the law governing international civil aviation is still territorial sovereignty. The multilateral conventions go far towards formulating comprehensive general rules on ancillary and technical matters; but concerning the fundamental requirements of international aviation there is almost always a reference back to municipal law. Both the Paris and Chicago Conventions exclude scheduled services, unquestionably the more important part of international transport, from their transit clauses. It is true that the two Chicago transit agreements represent a considerable advance; but it seems unlikely that the radical "five-freedom agreement" will attract many ratifications. Consequently, it remains true to say that the establishment of air lines is still

[1] For example, *Deruluft*, a company in which the German Lufthausa and the Soviet Government held equal shares, ran services between Berlin and Moscow from 1922 until 1937.

For pooling arrangements see Lissitzyn, *International Air Transport and National Policy* (1942), p. 395, and also Mance, *International Air Transport* (1943), p. 51.

[2] C.I.N.A., 13th Session, 1927. For discussion of the C.I.N.A. recommendations at the 14th session of the League of Nations Advisory and Technical Committee for Communications and Transit, see League of Nations publications C.168. M. 77, 1930, VIII.

dependent on the negotiation of bilateral agreements; a state of affairs which, judging by the experience of the past, is bound to retard the development of an efficient system of international civil air transport.[1]

If States are prepared to grant transit, landing, and commercial rights to foreign aircraft in bilateral treaties, why are they so shy of accepting similar arrangements laid down in multilateral treaties? In the first place, the interests which different States have in international civil aviation are so divergent that it is exceedingly difficult to devise a single general formula that will comprehend them all. The only hope seems to be to extend a measure of control over economic exploitation to an international body on which differing interest-groups could be represented.[2] As we have seen, the United States delegation at Chicago found itself unable to agree to a Canadian proposal for such international control, in spite of the precedent of the United States' own Civil Aeronautics Board. Even if some such scheme were generally accepted it might still pay some States with no interest to exploit save a fortunate geographical position to remain free to sell transit rights to the highest bidder; but mere geographical position is likely to become a wasting asset as the increased range of aircraft enables operators to bypass a State which tries to drive too hard a bargain. There can be little doubt, however, that the main reason for the persistence of the bilateral treaty is the argument based on security. It is no small matter for a State to permit regular visits to its soil by foreign aircraft, and Governments naturally insist on retaining the right to choose the States on which this privilege is to be conferred. It is not merely a question of barring a suspected State; the exploitation of international civil air transport is an instrument of diplomacy, and States cherish the power of encouraging the development of air lines designed to strengthen political ties and potential military alliances.[3] There seems to be little hope of removing this obstacle to a comprehensive system of public air law short of devising a satisfactory system of international security; but this is a larger problem.

[1] "There can be little doubt that air transport diplomacy was responsible for delaying, perhaps for several years, the establishment of regular air services on the last great international route—the northern transatlantic": Lissitzyn, *op. cit.*, p. 402.

[2] It is interesting to note that the Chicago Conference found it necessary to base election to the Council on interest groups. A trial vote for the Interim Council produced a result so unsatisfactory that separate successive elections were made of States to represent (1) chief operators, (2) States providing facilities, and (3) States elected to ensure that all the major geographical areas were represented. This procedure is embodied in Article 50 of the main convention.

[3] For examples see Lissitzyn, *op. cit.*, pp. 398–400.

TERRITORIAL WATERS: THE CANNON SHOT RULE

By WYNDHAM L. WALKER, M.A., LL.B.

I

"In the days of Bynkershoek, a cannon carried approximately three miles; hence the statement that a nation may occupy and exercise ownership over waters three miles within low water mark. This was the solution proposed by the young publicist; this was the solution accepted by the nations; this is the solution still obtaining, unless modified by express consent." This passage, taken from Dr. James Brown Scott's Introduction to the translation of Bynkershoek's *De Dominio Maris*,[1] is typical of the current explanation of the origin of the three miles rule. In substance, what Dr. Scott appears to tell us is that the modern rule of the three mile limit owes its origin to the work of the Dutch jurist, Cornelius Van Bynkershoek; that Bynkershoek laid down a general principle that a State was entitled to exercise sovereignty over the maritime belt extending seawards from its shore up to the extreme range of cannon shot; that the extreme range of cannon shot was about three miles; and that hence three miles came to be recognized as the limit of territorial waters. The purpose of the present article is, primarily, to explain the cannon shot rule as understood in French Admiralty circles in the eighteenth century and, with the aid of illustrations extracted from documents in the French archives, to examine the truth of some of the propositions laid down in the passage above cited.

That Bynkershoek himself never mentions a three mile limit is certain. The rule he mentions is a limit of cannon shot from the shore. It is equally certain that Bynkershoek did not invent the cannon shot rule. It was a rule existing in practice, at any rate for purposes of maritime neutrality in time of war, definitely in France and most countries with a Mediterranean seaboard, and probably in Holland many years before the time of Bynkershoek. It is questionable whether any cannon, either when Bynkershoek wrote or much later in the eighteenth century, had a range of as much as three miles. And despite much distinguished testimony to the contrary, it is submitted that if what Bynkershoek actually wrote is compared with the cannon shot rule as received by the statesmen of his time in practice, it is doubtful whether the writer meant to do more than to approve that rule. If he did not, there is to be found in the works of the Dutch jurist no trace even of a doctrine of a uniform maritime belt stretching seawards along the entire coastline of a State; he deals rather with a series of protected zones, in the ports and places covered by the actual guns of fortresses placed on the shore.

Professor Jessup, in his treatise on *The Law of Territorial Waters* (1927), seems, perhaps, to give Bynkershoek rather more than his due when he writes:

"It remained for a judge of the Supreme Court of Appeal of Holland to translate this idea [that expressed by Grotius, lib. II, cap. III, section XIII. 2] into a maxim

[1] *Classics of International Law*, Carnegie Endowment Series, 1923, p. 17.

which seemed to capture the imagination and convince the intellect. 'Imperium terrae finiri ubi finitur armorum potestas.' But not satisfied with a general theory, he put his maxim into material terms and declared that the territorial dominion of the State extended as far as projectiles could be thrown from cannon on the shore. Thus originated the doctrine of cannon range which is preserved on some statute books to this day and which may be described as the direct progenitor of the three mile rule."[1]

The well-known maxim of which Jessup speaks represented indeed in a clearer, more definite and more attractive form doctrines already formulated by Grotius[2] and other writers prior to Bynkershoek.[3] But as to the cannon shot rule itself, it is clear that, for certain purposes at any rate, a cannon shot rule, which Bynkershoek probably intended to accept and approve rather than consciously to extend, was accepted as well established law in France, and most probably was equally well known in Dutch diplomatic practice.[4] Bynkershoek may indeed be the earliest of the juristic writers to take notice of the rule; he may to some extent have generalized the rule accepted by certain countries in his day for limited purposes only; and he may have combined it in an attractive dress with the ideas of earlier writers. He may thus have helped not inconsiderably to popularise and secure wider recognition for the rule, but he can hardly be fairly described as its originator.

In the works of Bynkershoek the question of territorial waters arises in two distinct connections. In *De Dominio Maris*[5] the Dutch jurist discusses the question whether sea near or adjacent to the land[6] is capable of occupation. "Quare omnino videtur rectius", he decides, "eo potestatem terrae extendi, quousque tormenta exploduntur, eatenus quippe cum imperare, tum possidere videmur, loquor autem de his temporibus, quibus illis machinis utimur, alioquin generaliter dicendum esset, potestatem terrae finitur ubi finitur armorum vis". And he quotes with approval a decree of the Belgic Confederation of 1671 ordering commanders of their ships off the coasts of a foreign State to salute the ruler of the shore "quousque tormenta urbium et arcium exploduntur". It is by no means clear from this language that Bynkershoek has adopted the idea of a uniform zone or maritime belt extending seawards from the shore along the entire coastline of States abutting on the sea. That is the commonly accepted interpretation of his words, and it is not inconsistent with them. But all that he has actually said is equally consistent with the view that he is merely stating and approving the cannon shot rule as applied in the actual practice of certain States at the time he wrote. That rule did not apply the test of a fixed or uniform dis-

[1] P. 5.

[2] Lib. II, cap. III, section XIII. 2. "Videtur autem imperium in maris portionem eadem ratione acquiri qua imperia alia, id est, ut supra diximus, ratione personarum et ratione territorii. Ratione personarum, ut si classis, qui maritimus est exercitus, aliquo in loco maris se habeat: ratione territorii, quatenus ex terra cogi possunt qui in proxima maris parte versantur, nec minus quam si in ipsa terra repirentur."

[3] E.g. Huber, *De Jure Civitatis* (1673), Part 2, liv. 2, Ch. 11, p. 133; *Digressiones* (1671), liv. 4, Ch. 13, cited by Raestad, *La Mer Territoriale* (1913), p. 107.

[4] This impression is based on a few instances found in Fulton, *Sovereignty of the Seas* (1911). There should be evidence in the Dutch archives on this point.

[5] (1702), Ch. 2 (2nd revised ed. 1744).

[6] "Mare terrae proximum." "Maritime belt", the translation in the Carnegie Endowment edition, 1923, pp. 41 *et seq.*, does not seem a very happy translation of this phrase.

tance from the shore. It did no more than place under the protection of the territorial sovereign all ships lying off the coast covered by the actual guns of actual ports or fortresses. It was not a doctrine of a maritime belt. It was a doctrine of port or fortress areas or zones within range of actual guns mounted on the shore. Bynkershoek's words may be capable of both interpretations, but, in view of the doctrine known to exist in his day, it seems arguable that the present indicative tense used is more appropriate to actually present cannon which are actually discharged in the area than to imaginary guns or projectiles which can or may or might explode there.

In *De Dominio Maris*, therefore, Bynkershoek seems to go no further than this: "Can dominion be exercised (*a*) over the seas near the land, (*b*) over the high seas?" The answer, following Roman Law models, is that, provided a State can exercise a sufficient degree of control over the sea adjacent to land to amount to occupation, it is justified in treating that sea as under its dominion. This amounts to no more than Grotius and others had already agreed. But on the question of what degree of control is sufficient, Bynkershoek had a more definite and practical answer than most of his predecessors, though not an answer entirely of his own devising. He applied to this problem a rule which had grown up in practice for purposes of neutrality in time of war. Cannon shot as a general limit for all purposes for sovereignty over territorial waters, though it had been raised by Dutch diplomatists, in several instances at any rate, prior to the days of Bynkershoek, may perhaps be regarded as a new theory in international law, but it can hardly be said to be a "solution" which has been "generally accepted by the nations".

In *Quaestiones Juris Publici* (lib. I, C. 8) Bynkershoek meets the same problem from another angle, that of maritime neutrality: whether it is lawful to attack an enemy in or to pursue him into the port or territory of a friend. Here the matter is dealt with rather more fully than in *De Dominio Maris*, and it seems clearer here than in the earlier work that what Bynkershoek has in mind is not some novel principle or doctrine of his own but the actual cannon shot rule of diplomatic practice. Approving an Ordinance of the States General of 10 October, 1652, he holds that hostilities must not take place in neutral ports. But in "Mari terrae proximo, quousque tormenta castellorum exploduntur" he draws a distinction between hostilities started there, and cases of hot pursuit, which he apparently considers lawful provided that the actual forts are not attacked even though they aid the enemy. In this instance he is clearly dealing with the actual range of cannon in position. The basic principle which he states here, as in *De Dominio Maris*, is that limits such as "within sight of land or port" are too vague to protect from capture; that the sovereignty of the land has its limit at the place where "armorum potestas" ends. The cannon shot rule was not a vague one—it did not depend on the hypothetical range of some imaginary gun. It had no fixed distance, indeed, for it would vary with the calibre of particular cannon, but it could be ascertained without difficulty by the actual discharge of an actual gun. And it is submitted that there is no decisive indication in either *De Dominio Maris* or the *Quaestiones Juris Publici* that the rule which Bynkershoek approved was any other than this very limited but eminently practical rule.

Bynkershoek's treatment of the subject was indeed such that it could be

combined with the doctrines of others and used at a later date as an explanation and justification for the rule of the three mile limit, but he seems to have little real claim to be the originator of that rule.

Documents preserved in the Archives Nationales at Paris, particularly amongst those in the special collection belonging to the records of the Ministère de la Marine, throw light upon the doctrine of cannon shot as the limit of territorial waters in questions of maritime neutrality.[1] On the question of the three mile limit or any other limit than cannon range in France under the Ancien Régime, the Archives de la Marine have much less to tell. Examination of a mass of documents drawn from that source shows that the only cases in which a limit measured by mileage was ever under discussion by the French naval authorities in the eighteenth century were in negotiations with the Scandinavian Powers. Such documents as exist might give rise to an inference that the true origin of the three mile limit is to be found not in the Holland of the days of Bynkershoek but in the Scandinavia of the latter half of the eighteenth century. The published work of Raested, making use of Scandinavian sources, reveals much that seems in harmony with such an inference.

II

The identification of the three mile rule with the cannon shot rule makes its appearance at least as early as the last quarter of the eighteenth century. The Italian Galiani (1782) was the earliest known writer to introduce this historical combination or confusion—a fact which certainly lends support to the received view that the three mile rule represented an attempt to convert cannon range into terms of actual measured miles. But it seems nevertheless not altogether improbable that the two rules never had any real historical connection; they may well have been wholly distinct rules having their roots in different parts of Europe.

The question of the transition from cannon shot rule to three mile limit cannot be adequately dealt with in this article, though something must be said later concerning it. With the three mile limit as such, Bynkershoek had no direct contact. For him dominion depended, as with Grotius and others, on control, and by control in marginal seas was meant actual control by guns present on the spot. "Quare omnino videtur rectius, eo potestatem terrae extendi, quousque tormenta exploduntur." That was the rule of "la portée du cannon" applied consistently, it would seem, for purposes of neutrality in time of war both in favour of and against the interests of French privateers and shipowners in the eighteenth century. Whatever the meaning of the Dutch Judge may have been, it is quite clear that the French rule differed materially from what some have conceived that meaning to have been. The France of the time of Bynkershoek had its cannon shot rule, but in that rule there is no trace of the notion of a territorial belt of water extending along the coast for the distance of a cannon shot range out to sea. The rule is much more practical and definite: if there was no cannon there was no question of cannon range, and the hostile vessel might quite lawfully be captured no matter how close it was to the shore—anything short of

[1] References to documents in the general series at the Archives Nationales are given in this article under the abbreviation A.N., those in the special Collection de la Marine as A.M.

actually aground was sufficient. In France only those captures were considered unlawful which were made "sous les forteresses"—captures made when the ship captured was seeking the protection of an armed place in a neutral State.

At the close of the seventeenth century the great war against France which started in the War of the League of Augsburg, to be followed after a brief respite by the still more prolonged struggle of the War of the Spanish Succession, gave rise to a number of incidents in which the limits of neutral waters came in question.

Thus, in 1690, a complaint was made by the Genoese Senate concerning the capture made by a French ship off San Remo, and the French Minister was instructed to inform the Senate that the King of France had given orders that neutral vessels were not to be taken when under the guns of forts such as Genoa itself, but that small places along the coast, such as San Remo, Porto Maurizio, etc., could not afford any protection to enemy vessels. France in this instance presented a counter complaint regarding a capture made by the Spaniards off the port of Porto Venere. "Et comme c'est un des ports dans lesquels il peut demander avec justice qu'on ne fasse point de prises vous declarerez que si la république n'engage pas les espagnols a lui faire justice, le Roy n'empeschera pas que les corsaires francois ne fassent des prises dans ce mesme endroit sur ses ennemis."[1] Further complaints against the conduct of the Genoese were not long in following, and seem to have had a certain measure of success.[2] About the same time Tuscany was also complaining of violations of her neutrality. In 1690 the Grand Duke made remonstrances to France on the capture of an English ship, *The Mauretania*, by a French corsair in contravention of the neutrality of Leghorn. The allegation was made that it had been taken in the port of Leghorn. This fact, however, was in dispute, and another statement put the place of capture as six miles from Leghorn.[3] The French captor asserted that the English ship attacked him first, and the ship was apparently condemned by the French Prize Court.[4] The French Government, however, felt it necessary to give fresh orders to the corsairs to respect the neutrality of Leghorn and to threaten the severe punishment of those who might disregard it.[5]

In November 1690 France in her turn addressed complaints both to Genoa and to Tuscany concerning violations of their neutrality by the English and the Dutch. The Grand Duke was informed that if he could not get his neutrality respected so as to protect French ships, France herself would be no longer able to respect it.[6]

In the following year friction also arose between France and Venice over

[1] Letter of the Secrétaire d'État de la Marine to M. Dupré, 24 February, 1690: A.M., F².8.

[2] 24 November 1690, letter to M. de Ratabon stating that energetic remonstrance is to be made to Genoa to compel the Allies to treat that port as neutral: A.M., F².8. (Where not otherwise stated, letters cited are from the official correspondence of the Secrétaire d'État ayant le département de la Marine.) See also letter to Ratabon, 1 February, 1691, A.M., F².9, fo. 62: The King of France expresses satisfaction at the Genoese reply, and states that he will observe the same practice as that followed by the enemies of France. He therefore hopes that Genoa will use its influence with the enemies of France to ensure complete neutrality.

[3] Letter to M. Foucher, 26 July, 1690: A.M., F²8.

[4] Arrêt, 31 October, 1690: A.M., F².8.

[5] Letter to Foucher, 21 August, 1690: A.M., F².8.

[6] Letter to Foucher, 12 November, 1690: A.M., F².8.

captures made by the Dutch in Venetian waters,[1] with threats by the French Minister in the event of failure by Venice to secure respect for her waters: "La règle que le Roy c'est fait dans cette guerre estant de traiter avec les princes neutres de la mesme manière qu'ils souffrent d'estre traitez par les ennemis".

Two months later, operations of Sicilian galiots in capturing a French ship "sous la forteresse de Coron" (apparently Koroni, in S. Greece) brought on a more heated exchange between the Governments of France and Venice. At the end of October Venice, having failed to give any satisfaction, was informed that she must expect the French to follow the same practice as their enemies.[2] In answer to the claim of the Venetian Senate that the capture was not made within cannon shot, it was asserted that guns were actually fired from the shore.

In Northern Europe at this time important negotiations concerning limits of territorial waters were afoot, an agreement between France and Denmark being under discussion.[3] An Ordinance of the King of Denmark of 13 June, 1691, had ordered Danish warships to restore all prizes taken "within his jurisdiction and in sight of his coasts". Foreseeing the difficulties to which this might give rise, the French King at once ordered his ambassador to negotiate a more definite agreement, appointing commissioners to determine the meaning of the terms "within his jurisdiction and in sight of his coasts". As to jurisdiction, the King's instructions were: "Je vous ai marqué que dans la dernière rigueur elle est determinée par la portée du canon, mais Sa Majesté se remet à vous d'en passer jusqu'à trois lieues pour ne point entrer dans les longues discutions des droits des Roys de Dannemarck". Any arrangement was to be subject to reciprocity on the part of the enemies of France.[4] These instructions seem to have been carried out by Martangis in a letter dated 6 August, 1691, in which he claimed that "le respect des costes en quelque lieu de l'Europe que se soit n'a jamais este étendu plus loin qu'à la portée du canon ou à une lieue ou deux au plus".[5]

The Danish claim was that territorial waters extend to the limits of eyesight, or about four or five leagues from the islands off the coast. The French, while maintaining that cannon shot range was the accepted law, were prepared for political reasons to make concessions. Raestad in 1913 had not apparently then found any earlier instance in which cannon range was indicated as the limit of territorial waters in matters of capture at sea.[6] But it is, in fact, evident that in France the rule was being treated as established law at least as early as 1685.[7] The impression given by the series of correspondence of the French Ministère de la Marine starting at that time, is that it was then already well-established doctrine in France. France continued to treat it as such during the next hundred years.

In September 1691 the Franco-Danish negotiations were still in progress and the French Ministre de la Marine, in a new effort to reach agreement, put forward the suggestion that the agreed limit might be varied in different

[1] Letters to M. De la Haye, 3 May and 15 June, 1691: A.M., F².9.
[2] Letters to De la Haye, 8 August, 12 and 19 September, 31 October, 1691: A.M., F².9.
[3] Letters to Martangis, 21 June, 31 July and 5 September, 1691: A.M., F².9.
[4] Letter to Martangis, 31 July, 1691: A.M., F².9, fo. 393.
[5] Raestad, *La Mer Territoriale* (1913), p. 111.
[6] *Ibid.*
[7] Letter to M. De Croissy, 19 January, 1685: A.M., F².7.

places—a two-league limit being suggested for the Norwegian coast up to Trondhjem, and a larger extent for Jutland. The negotiations, however, hung fire, and further questions, such as the release by the Danish authorities of prizes brought into Norwegian ports by French corsairs, increased the difficulties in the way of agreement.[1]

It is probable that in these negotiations we find the meeting-place of two distinct currents of practice. On the one hand, there is the practice of France and other Powers as to neutrality in war-time, based on cannon range of actual cannon, i.e. protection to be given to those seeking refuge "sous les canons des forteressess". On the other hand, there is the practice of the Northern Powers of Europe fixing a territorial coastal belt measured by mileage—a practice which appears to have far more in common with the later three mile limit than does the cannon range doctrine. The authority of Bynkershoek was cast into the scale some ten years later (1702) against the actual claim made by the Danes, viz. to waters within sight of land, but it was the basic idea of the Scandinavian standpoint—though cut down and limited in extent—that ultimately gained the day and opened the door for the entry of the three mile limit.

During 1692 Genoese neutrality continued to give rise to dispute. Thus on 6 February the new Ministre de la Marine, Pontchartrain, who had succeeded to that office on the death of Seignelay, writes to M. de Ratabon:[2] "J'ai rendu compte au roi de la demande que vous a été faite par le Sr Galuago au nom de la république de Genes de la neutralité pour tous les ports de sa dépendance. Sa Majesté m'ordonne de vous dire qu'elle ne changera rien à la résolution qu'elle a pris sur ce sujet, et qu'elle ne laissera jouir de la neutralité que les ports des villes bastionnées et fermées de murailles telles que Genes, Salerne et Port Vendée et ceux de l'Isle de Caché qui se trouveront dans ce cas, à l'égard des ports qui sont ouverts et hors d'estat de donner protection ni secours comme il y en a un nombre si considérable que ce serait une retraite seure pour les corsaires de final et mayorque que les mettrait en estat d'incommoder sans danger pour eux le commerce des sujets de sa Majesté, elle ne peut consentir de leur accorder la neutralité qui est demandée—quelque intention qu'elle ayt de traiter favorablement la république, les vaisseaux ennemis qui s'y trouveront y seront attaquez comme ils ont pu l'estre jusqu'à présent."

A few months later it was the turn of the Grand Duke of Tuscany to complain, by reason of the conduct of the captain of a French brigantine which had boarded a Neapolitan barque off the Tuscan island of Gorgona. When the Governor of the island protested, the French corsair merely prepared to fire on the place. On complaint being made to the French Envoy at Florence, the French Government accepted the justness of the claim and took action against the captain.[3]

Shortly afterwards, however, another remonstrance by the Grand Duke met with less success. The Spanish Consul complained of a French capture made six miles from Leghorn. This complaint, says the French Ministre de la Marine, cannot be admitted.[4] The extent of the port of Leghorn is

[1] Letters to Martangis, 30 September 1691: A.M., F².9; 30 January 1692: A.M., F².10, fo. 79.
[2] *Ibid.*, fo. 88.
[3] Letter to Admiralty Officers at Marseilles, 2 April 1692: A.M., F².10.
[4] Letter of 23 July 1692, *ibid.*

admittedly unfixed, but, in default of agreement, "cette estendue ne peut aller qu'à la portée de canon et à deux lieues au plus". But the Grand Duke was to be assured that strict orders had been given to the corsairs to respect the neutrality of Leghorn.

In 1693 the conduct of Portugal began to give rise to dissatisfaction in France. The French claimed that a Dutch flute taken by them under the guns of a Portuguese fortress had been released, whereas in the case of two French ships taken by the English under the guns of the forts of Lisbon no redress could be obtained.[1] Some months later further communications regarding territorial waters passed between France and Portugal. On 5 August 1693[2] Pontchartrain writes again to M. l'Abbé D'Estrées: "J'ai rendu compte au Roi de la prétention qu'a le Roi de Portugal qu'on ne doit prendre aucuns vaisseaux sous les petits forts qui sont le long des costes; Sa Majesté vous a expliqué qu'elle voulait bien consentir qu'ils servissent d'azile pour mieux marquer à ce prince la considération qu'elle a pour luy, quoique l'usage observé à l'égard de l'espagne et de tous les princes d'italie soit que les seuls forts bastionez ayent ce privilège, mais elle desire que vous lui demandiez qu'il oblige les ennemis à en user de la meme manière." To this concession from the normal French rule was annexed a request for the immediate release of a ship taken by the English off the little fort of Sacre.

In September 1693 we find complaint being made by France against Malta for failure to secure respect for her neutrality in the case of a capture made by the Spaniards in the Maltese port of St. George.[3] Representations made by the Envoy of Malta to Spain having proved unsuccessful, the French Government resorted to their usual threat that they would allow their corsairs to imitate the enemy. "Elle scait qu'un corsaire peut sans aveu violer le droit des gens, mais il est avoué desqu'il n'est pas puni, ainsi si le Roy d'espagne n'en donne pas l'ordre à ses officiers et s'il ne fait pas restituer la barque française il viole premier la neutralité dont votre isle a joui jusques à présent et c'est à lui que vous devez vous plaindre des suittes que ce procédé peut avoir."[4]

In 1696, in the case of a Genoese tartane, *The St. Jean Baptiste* or *St. Joseph Antoine*, the French captors not only maintained the regular standpoint of the French Government as to the difference between fortresses and minor ports, but also claimed a right of hot pursuit. The tartane was captured in a Tuscan port, "Calo dit Forno".[5] It had apparently actually reached the port, since the captain of the prize explained that he had no bills of lading on board because in accordance with usage he had taken them to the governor of the port. The corsair, on the other hand, alleged that "Elle estoit encore à la mer quand il lui a fait la semonce accoustumée et que sa fuite le mettoit en droit de le poursuivre en tous ports, et en toutes rades, que le port de Callo n'est pas mesme un de ceux dont les armateurs reconnoissent la franchise, et que la course seroit inutile dans la Mediterrannée si chaque port de cette qualité pouvait servir d'azile aux vaisseaux ennemis".

[1] Letters to M. D'Estrées, 1 April 1693: A.M., F².11, fo. 263; to De L'Escole, 22 April; to the same, 3 June 1693, *ibid.*, fo. 449.

[2] A.M., F².12, fo. 73.

[3] *Ibid.*, fo. 17.

[4] Pontchartrain to the Grand Master of Malta, 2 December 1693: A.M., F².12.

[5] With the means at my disposal I have not been able to verify all the places or proper names appearing in my notes of extracts from the French Archives.

Despite further allegations of resistance and carriage of false papers, both ship and cargo were released.[1]

During the War of the Spanish Succession the views of the Government of France on the question of neutral waters remained unchanged. In 1704 Venice claimed the restoration of an English ship pursued into the roadstead of Rovigno and taken there by a French frigate. The French Admiralty view was that in any event the capture was lawful, "puisque cette ville n'ayant pour toute artillerie que deux pierriers, elle ne peut suivant les règles at l'usage estre regardée comme une azile; puisque elle n'est point assez forte pour le procurer pour elle même". The Secretary of State further complained of the *Podestat* and officers of the Republic for aiding the English captain to save the greater part of the cargo.[2] Venice continued to press the matter, but in April had still obtained no satisfaction.[3]

At the end of the same year the Grand Duke of Tuscany put in another remonstrance concerning a ship which he alleged was captured "à la veue et sous le canon" of the port of Leghorn by a French corsair, *Brémond*. He demanded that the prize taken should be surrendered to him. The Ministre de la Marine did not accept the facts alleged. The prize, he declared, had been first chased when a long way from Leghorn and had been captured before it was within gunshot of the place. He alleged that in a similar case where a French ship had been sighted off the lighthouse of Leghorn by three Dutch corsairs which were in the port and which came out and took it, the Grand Duke himself replied to the complaint of the French Envoy that, though the conduct of the corsairs might be lacking in respect to the place, it was not contrary to neutrality.[4]

In 1705 the cannon shot rule was again in issue in the case of *The Michel Archange*, a Genoese ship stated to have been arrested "sous le canon" of Alicante. The governor of the place protested against the capture. The captor did not dispute the rule, but claimed that he was certainly anchored at more than a cannon shot and a half from the shore, and stated that he had deliberately abstained from attacking another ship which was at the time really under the guns of the fort—which *The Michel Archange* was not.[5] The captor, however, failed to make out his case and the ship was released.[6]

In 1710 the Ambassador of Tuscany raised the question of the capture of four Dutch ships by l'Aigle and Hodart, captains of the French corsairs *La Phénix* and *Le Prince de Frise*. The Ministre de la Marine supported the action of the corsairs as being in conformity with the rules and usages of war.[7] The captors alleged that when five miles out to sea off Vada on the coast of Tuscany they sighted two Dutch ships five or six miles away, and gave chase. The larger ship, after a short fight, hauled down its flag and surrendered. L'Aigle then pursued the second, which was taken without resistance. When, however, he had put a prize crew on board, he found that the wind had freshened and that the first ship to surrender had re-hoisted its

[1] Arrêt, 12 May 1696: A.M., F².16, fo. 151.
[2] To M. le Marquis De Torcy, 13 February 1704: A.M., F².21, fo. 24; also 27 February 1704: *ibid.*, fo. 37.
[3] To Torcy, 2 April 1704, *ibid.*, fo. 68 vo.
[4] To Torcy, 24 December 1704: *ibid.*, fo. 266.
[5] A.N., G5, 214.
[6] 14 July 1706: A.M., F².23. There are a number of letters concerning this case in F².23.
[7] To Torcy, 27 June 1710: A.M., F².36, fo. 234.

flag and was running for the port of Leghorn. Pursuit at once began, and the Dutch ship, being outmanœuvred, was obliged to run aground between Leghorn and Antignano near the Ardenza towers. There it was seized by the French "comme d'un bien qui luy estoit acquis par le combat qu'il avoit précédemment rendu". These towers, which had no garrison beyond one man posted to send signals, the corsair complained, had "assez de témérite et d'audace" to fire on the French ship all the artillery that they had, which in fact consisted only of some little "falcons" (a gun of small calibre firing shot of from 125 to 2500 grammes), intended only for making signals on the approach of Barbary pirates. "Les forts avancez de Ligourne tirerent aussi quantité de canon mais estant éloignez de plus de trois milles le canon à toute volée ne portait pas assez chemin." Thus it was proved that the ship was not under the protection of that place. In fact, adds the French Minister, the Governor of Leghorn doubtless fired all his cannon because for each cannon discharged he received from the Grand Duke from fifteen to twenty times the cost of the ammunition expended. The corsair admitted that the prize was fired upon while aground, in order to prevent the enemy from carrying off the cargo, and that it was therefore quite likely that his shots had landed on the shore, but he denied that he had deliberately fired on the troops of the Grand Duke or on the forts.

The day after this capture a further incident occurred. Two other Dutch vessels had been met, one of which, *The Galley of Amsterdam*, ran itself aground between the towers of Bocale and Romito, more than nine miles from Leghorn. The French attempted to board, but the enemy resisted and endeavoured to land their cargo. This, it was alleged, compelled the French to send soldiers ashore, "pour repousser la force par la force et se servit de l'exemple que les ennemis luy donnaient en commettant des actes d'hostilité sur les terres du Grand Duc". The ship was then captured where it was aground. The French Ministère de la Marine tried to resist the demand of the Grand Duke by making counter-allegations. In 1708, said the Minister, a French ship was taken by a Neapolitan under the guns of the tower of St. Jacques within cannon shot of Leghorn, the Neapolitans even establishing a battery of two guns on the shore in order to effect the capture. Yet the Grand Duke allowed the ship to be sold at Leghorn and refused to intervene, and the ship itself was declared good prize at Naples. The French Minister cites further the case of Prasca, a Genoese, who armed a ship at Leghorn, obtaining arms from the magazines of the Grand Duke; the attack on *La Sylvie* by an English squadron in sight of Leghorn, and its capture when under the guns of the place; and other instances in which the Grand Duke rejected the French complaints. This proves, says the Minister, that the enemies of France have no respect for the neutrality of Leghorn.[1]

In connection with this episode there appears in the French Archives[2] a Memoire entitled "1710. Prises faites sous les tours des princes neutres. Memoire sur les plaintes faites par l'envoyé du Grand Duc de Toscane. (Envoyé copie a M le nonce extraordinaire 7 july, 1711)". This contains an exposition which appears fairly to represent the general view on this matter consistently held by the French Government at this period. It is agreed, says the writer, that by the law of nations and by the usages observed in

[1] A.M., F².36, fo. 234.

[2] A.M., F².71.

the whole of Europe, captures should not be made nor any act of hostility committed on the lands of a neutral or allied prince. For the lands of a neutral or an ally are considered and are in fact an asylum which can and ought to place in safety those who have recourse to it and who can take refuge there. But though this principle is certain, care must be taken not to misapply and abuse it. "Il serait ridicule par exemple de vouloir l'étendre à toutes les costes les plus escarpées d'un état envirronné de la mer et de s'imaginer que ce serait rompre la neutralité que de prendre des vaisseaux ennemis ou de les faire échouer à des costes qui auraient trois ou quatre cents lieues de long." Coasts of such a nature cannot act as a refuge or place of security from a pursuer. Anyone who would apply the maxim to coasts in a reasonable way must agree that it cannot be applied to coasts which cannot provide a place of refuge to ships which are pursued, either by providing them with a harbour into which they can withdraw or forts which can by means of their guns prevent corsairs from approaching, and where the bottom is so good that the pursued ship which has run aground can be considered as on the neutral shore and can only be taken by a ship which would itself run aground and so could be considered to have committed a hostile act on the neutral land. The coasts of Italy are far from being coasts of this kind. Even the smallest ships cannot approach the shore without risk of destruction owing to the badness of the bottom. When a ship which is pursued off these coasts wishes to run itself aground, it can never get right ashore, but is always stopped when some way out by the badness of the bottom. The coast of Italy therefore must not be counted as of the kind which can provide a place of refuge in itself where ships can escape the pursuit of corsairs. Considering the question of what ports or fortresses can afford protection or give the Grand Duke a right to reclaim ships taken there to the prejudice of his neutrality, the writer observes that as to ports no difficulty has arisen, since the Grand Duke has made no complaint as to the capture of ships while actually in ports, or even pursued into them. As to fortresses, however, the Grand Duke has complained that the Dutch ship *Le Dauphin d'Oré* had been captured when under the guns of Antignano, which he claims to be a considerable fortress to some degree forming part of that of Leghorn, from which it is in fact only three miles distant. This claim has some appearance of foundation and must be considered in the light of more exact geographical information as to the situation of the fortress and of the places than possessed by the writer of the memoire at the moment. But with regard to the capture of the *Galère* of Amsterdam, claimed by the Tuscan Envoy as taken under the fortresses of the Grand Duke, it appears that he is giving too extended a meaning to the term fortresses. The ship was taken within sight of two towers called Romito and Cala furia Or. These towers are not fortresses. They certainly were not constructed to defend the coast, and they have been in fact customarily used only for signalling purposes when suspicious looking ships are sighted. There is neither garrison nor soldiers in these towers, but only a man to make signals with one or two swivel guns which can make a noise but which could not carry sufficiently far to reach any ship, even if it had got as near inshore as it possibly could at that spot. The claim of the Tuscan Envoy that ships taken in sight of these towers must be treated as being under the guns of the

fortress is therefore too wide. Moreover, he seems to have been misinformed in certain particulars as to what actually took place. He alleges that the French went ashore to capture the ship as it lay aground, and that thus they committed a breach of neutrality. On the contrary, it was the Dutch who went on shore, after running their ship as close to the shore as they could get, and from the shore they fired on the French. This gave the latter the right to land also to pursue those who were firing on them. It was not even true that the French landed on the actual territory of the Grand Duke; they posted themselves only on a little rock entirely surrounded by sea which forms no part of the coast, and it was from this spot that they compelled the Dutch to withdraw. Thus, says the author of the Memoire, there has been no difficulty in deciding that the capture of the *Galère* of Amsterdam was lawful. But as to the capture made under the fort of Antignano, further consideration is necessary before judgment.

Cases noted from the War of the Austrian Succession do not carry the history of the cannon shot rule much further. They show, however, that the rule was still accepted by the French courts and administration. On 19 January 1748, therefore, when an enemy ship, *The St. Barthelemy* (Dutch), had been captured, the Spanish Commissaire de la Marine of Ste. Ogne (Santoña) claimed the prize as taken "sous la batterie de la forteresse de Ste. Ogne". The captor asserted that, when attacked, *The St. Barthelemy* was three-quarters of a league from land, and that as the cable of the anchor was cut by the Dutch crew and the anchor itself was raised by the Spanish Commissaire de la Marine two days later, the place of the capture was absolutely fixed by neutral testimony. That position, says the captor, proves conclusively that the capture was made on the high seas outside the range of the guns of Ste. Ogne "puisque il n'y a aucun canon de quelque gros calibre qu'il soit qui puisse porter à une demie lieue". The testimony of the Spanish authorities put the place of capture as one league "au large du château et montagne du port". The ship was condemned by the French Prize Court.[1]

Fifteen years later, in 1763, we find the cannon shot rule being enforced, not without some fears of possible resulting diplomatic difficulties with Algiers, in the case of a Spanish pink, *La Notre Dame du Rosaire*, taken by an Algerian corsair at the entrance to the Gulf of St. Tropez, at half cannon shot range from the shore. The corsair was unable to get away from the gulf at once with its prize, and the French authorities detained the prize. The release of the prize to its owners was ordered.[2]

During the War of American Independence, the French rule as to the asylum afforded by neutral territory to belligerent or neutral ships was still the *portée du canon* rule—the range of actual cannon, under whose protection the threatened ship could lie in safety. Thus in 1779 the allegation in the case of *La Margueritte* was that it was captured "sous le canon du fort de Livourne"—three or four miles from the actual port of Leghorn, off the mouth of the Arno.[3]

It may therefore be concluded that in the maritime practice of France at

[1] Judgment of 17 October 1748: A.N., G5. 259, fo. 489.
[2] A.M., F².42, fo. 128, 177.
[3] 6 October 1779, 23 June 1782: A.M., F².4.

any rate, by the latter half of the seventeenth century, it had come to be regarded as an established rule of international law that where in time of war a ship was captured while in a neutral port or under the actual guns of a neutral fortress, there was a violation of the duty owed to the neutral sovereign. Ports, or areas of sea covered by the actual guns of a neutral fort, alone gave protection. There was no question of a maritime belt surrounding the shores of the neutral State. The theory was one of zones or areas of fire of actual cannon. Exactly how and where the rule had its origin is still obscure. But it was certainly well established in French practice before the days of Bynkershoek, and there is no evidence that it owes its origin to any juristic writings. The background of the rule, it may be guessed, lies not in the domain of the protection required by the territory, but in the protection accorded by the neutral sovereign and the question of his personal dignity (in the same general field of ideas which formed, in another sphere, the basis of the "King's Peace" and the Right of Sanctuary: that if a stranger has placed himself under the actual protection of the territorial sovereign it is a violation of right and an insult to the protecting ruler to break in and seize the fugitive). The doctrine continued to hold the field in France throughout the eighteenth century until the extinction of the Ancien Régime. It does not appear whether any other State ever disputed this claim to protect enemies from attack while in port or under the guns of an undoubted fortress. The present writer has met no evidence of any such dispute. The controversies turned on other matters, upon wider claims or upon questions of fact, such as whether the capture had actually taken place within cannon shot range or whether the place in question was a fortress. It is clear that by 1685 at latest the cannon shot rule was being considered in France as established law.

In Holland, the rule was at any rate known nearly a hundred years before Bynkershoek wrote. In a document cited by Fulton, *Sovereignty of the Sea*,[1] a Dutch Embassy, contending in 1610 in negotiations with England for freedom of fishing, is recorded as arguing: "For that it is by the law of nacions no prince can challenge further into the sea than he can command with a cannon except gulfes within their land from one point to an other". It is interesting to note that, though writers have pointed out that the cannon shot rule was one which was accepted, if at all, principally if not solely in cases of neutrality in time of war, and have considered that part of the distinctive features of Bynkershoek's work lay in erecting into a general rule one applied in practice in a more limited field, both in this case and in a case in 1740, the envoys of Holland put forward the doctrine in a case which concerned not maritime neutrality but control over coastal fisheries. These may or may not have been isolated instances, but they give rise to the doubt that, though Bynkershoek may have been a pioneer in the generalization of the rule, it is not impossible that in this he followed rather than formed an opinion already prevalent in his own country in his day.

In 1740 a Danish frigate had captured seven Dutch fishing vessels for fishing too close to Iceland.[2] In the resulting dispute the Dutch claimed that their fishermen were free from all blame, for they were fishing more than a

[1] (1911), p. 156, quoting from *State Papers, Dom.*, xlvii. iii.
[2] Raestad, *op. cit.*, p. 117.

cannon shot range from the shore. The Danish Government, however, claimed under their own law a right of control over fisheries up to four leagues from the shore, and declined to give way.[1] Further research in Dutch archives might shed light on the extent to which the cannon shot rule was accepted in Holland in the seventeenth and eighteenth centuries, but it certainly seems not improbable that the cannon shot rule of Bynkershoek, so far from being a juristic innovation, represented but the recording in a legal work of a rule already as well established as a doctrine of Dutch diplomacy as it was in the diplomacy of France. In the incident of 1740 it is further worthy of notice that it is again Holland which supports cannon shot, and Denmark which claims a territorial belt measured in leagues from the shore. And it is not without interest, on the question of the common origin of cannon shot rule and three mile limit, that a Dutch diplomatist taking part in the dispute could declare still: "Je ne crois pas qu'il y ait au monde aucun canon qui porte une, encore moins quatre lieues". The dispute itself seems to have remained unsettled.[2]

III

That the work of Bynkershoek popularized the cannon shot rule, particularly in those countries where it had hitherto not been generally received, is extremely probable. Later writers of great influence—Vattel, for example—appear to be mainly indebted to Bynkershoek for what they write about the rule. But the evidence seems to point to the *portée du canon* rule having been first developed in international practice unaided by writers, rather than through acceptance of the theories of jurists by the statesmen of the world.

The writings of jurists, particularly in the eighteenth century, call for review so far as they concern the cannon shot rule and the transition to the three mile limit. These, however, can be dealt with only very summarily within the limits of this article.[3]

The doctrines of the medieval commentators, the 100 mile rule of Bartolus of Saxo-Ferrato, the views of Baldus, Bodin, Pacius, Gentilis and others, and the controversies connected with the wide claims to jurisdiction which gave rise to Mare Liberum and Mare Clausum, are accessible in a number of published works and the reader is referred to them. The claims of those who held that the sea could be subjected to the dominion of States tended to be large and often vague and ill-defined. Early writers discussed general principles or supported wide claims backed by allegations of prescriptive rights, such as the claims to jurisdiction in the British Seas which place much of the English practice and the writings of English jurists on a special footing in controversies relating to territorial waters in the seventeenth century. Some of those principles, such as the test of actual control laid down by Grotius, were those on which the later more limited rules were built, but they were too general to provide a complete solution to diplomatic problems arising in practice.

Cannon range, which makes an appearance in the works of seventeenth-

[1] A view which Denmark continued to maintain for fishery purposes off the Faroes and Iceland up to 1836: Raestad, p. 117.

[2] Fulton, *op. cit.*, pp. 558, 559.

[3] Raestad, *op. cit.*, p. 117.

century jurists in connection with the salutes due to forts on foreign coasts or visitation at sea, does not do so in connection with maritime neutrality. Thus Molloy, an English writer, in *De Jure Maritimo* (1676), Cap. I, section X, while declaring captures in a neutral port unlawful, makes no mention of cannon shot or any similar rule as a limit within which hostilities may not take place. Other seventeenth-century works which might have mentioned the rule do not do so. Bynkershoek, therefore, though he may not have been the inventor of the rule, seems to have been the earliest recorded writer to import it distinctly into the literature of international law.

In the eighteenth century, on the other hand, the cannon shot rule appears in the works of a number of writers. Thus Casaregis, an Italian author of very high authority in his day in maritime matters, writing in 1740, accepts the rule. Foreign ships are under the protection of the prince through whose sea they sail, when they are in his ports or in the adjacent sea within range of guns on shore; they must be restored if seized by the enemy there. Casaregis, however, accepted the old 100 mile limit of the medieval commentators for other purposes such as criminal or civil jurisdiction.

Northern European writers in the seventeenth century, however, follow a rather different line of thought, represented by the great name of Samuel Pufendorf.[1] Pufendorf suggests that, since the inventions of warships, those parts of the sea which may be treated as a rampart to a country might be regarded as belonging to that country, thus envisaging a maritime belt serving for purposes of the defence of the territory. Pufendorf himself does not indicate that he had ever heard of the cannon shot rule, but in the translations of his work into French by Barbeyrac in the eighteenth century the views of Bynkershoek are included in the notes.

Amongst the earlier writers of the eighteenth century, two writers whose work is independent of that of Bynkershoek on the cannon shot rule deserve attention. In 1746, F. J. Abreu y Bertodano published at Cadiz a Spanish treatise, the *Tradado Juridico-Politico sobre Pressas de Mar*.[2] Abreu answers the question whether it is lawful for corsairs to attack enemy ships in the ports of neutral powers by a decisive negative: "il est néanmoins certain que la foi publique et le droit des gens leur défendent de les inquiéter dans les ports, baies et rades des puissances neutres".[3] He further holds that even if the combat started outside the port, pursuit into the port itself is unlawful. It is not the start of a fight but its end which determines the fate of the ship attacked, so it is the spot where it surrenders on which the lawfulness of the capture should depend.[4] In Chapter V he goes on to deal with attacks made in waters adjacent to the ports of neutral powers. He accepts the proposition that there can be no ownership of the open sea, but accepts also the proposition of the ancient jurists that the sovereign of a province or an island is also sovereign of the adjacent seas at least up to a distance of 100 miles in a straight line—a proposition which he rightly describes as founded principally

[1] *De Jure Naturae* (1672), liv. 4, cap. 5, sections 7–8.

[2] This author should not be confused with José Antonio Abreu y Bertodano, who published a collection of Spanish treaties (1740–52). The *Tratado . . . sobre Pressas de Mar* appeared in a French edition in 1758 and there was a second French edition augmented by notes by Bonnemart in 1802. All three editions are in the *Bibliothéque Nationale* at Paris.

[3] 2nd French edition (1802), Chapter IV.

[4] Chapter IV, section xvi.

on the need for the suppression of piracy. But practice in prize matters, he declares, is quite otherwise. "Les puissances neutres n'ont jamais garanti des poursuittes des armateurs que les bâtimens entrés dans les ports de leur domination ou ceux qui se sont mis à couvert sous le canon de leurs places maritimes". Abreu concludes that up to his time no power in Europe has reclaimed prizes taken by corsairs or has objected to corsairs pursuing and taking them so long as they were out of cannon shot from the shore, and that corsairs may therefore rightly capture ships of their enemies, even when in sight of the ports of neutral princes, provided that at the time of capture they were not "sous leur canon". Abreu however is not fully satisfied that the general practice of all States sanctions this opinion. He therefore contends that the jurisdiction of a State like Spain, which has ports on the Ocean, ought to extend for 100 miles: in the case of narrower seas the jurisdiction ought to be proportionate to the extent of the coasts and the width of the sea. Taking his cue apparently from the English Hovering Acts then in force, he seems to think two leagues a reasonable limit for seas such as the English Channel.

R. J. Valin, a French Admiralty official, writing during the period of the Seven Years War, also proclaims the cannon shot rule as the recognized practice. In his later work, *Traité des Prises*,[1] Valin ignores earlier and wider claims to jurisdiction over adjacent seas and bases himself on the French practice of his day. "Quant aux prises qui seroient faites dans un port étranger, ami ou neutre, ou sous le canon d'une forteresse d'une puissance aussi ami ou neutre; elles ont toujours été défendues par le droit des gens, et par les traités anciens et nouveaux conclus entre les puissances." He cites the *Journal de Commerce* of May 1759, and holds, approving Abreu, that even if the attack should have started in the open sea or otherwise beyond cannon shot, capture is illegal. As to prizes taken in seas adjacent to ports of the same neutral Powers, he states that Abreu declares them null, especially if they have been made less than two leagues from the coast. Valin's reference to two leagues is framed as an expression of opinion, not as a statement of current practice. For certain purposes, however, as Valin points out in his *Commentary on the Ordonnance de la Marine* (1760), by treaties of commerce or otherwise, two leagues from the shore seemed to be acquiring a certain measure of support as a limit for the exercise of juisdiction at sea. In the portion of his commentary dealing with freedom for fisheries (Livre V, Titre 1), Valin discusses at greater length but with rather less clarity the extent of maritime domain. He states the various conflicting opinions—100 miles, sixty miles, two days' journey, limit of view—and also makes mention of Bynkershoek's view, which seems to have reached him through Barbeyrac's note on Pufendorf. To this he adds a suggestion of his own, that for fishery purposes the depth of the sea is a material factor not to be lost sight of, and that the limit might be based on whether sounding is possible or not. In general, he seems to think that two leagues, which had appeared in certain treaties for customs purposes and had been approved by Abreu in certain cases, was a not unreasonable limit. Finally he says, subject to a restriction in the case of very narrow seas, up to two leagues from the shore is within the domain of the sovereign of the coast, whether soundings can be taken or

[1] (1763), Chapter IV, sections 3–6.

not, but, for jurisdiction or fishery purposes, that should not prevent dominion over the seas extending beyond that limit up to the spot where sounding ceases to be practicable. But after having stated the two leagues' principle he then adds "or up to cannon range, which is to-day the rule universally recognized".

Valin's view, therefore, would seem to have been that though cannon shot was the received rule, a uniform belt based on a general principle of two leagues, subject to certain exceptions due to local geographical peculiarities, would be better. His mention of Bynkershoek is incidental, and obviously he derived his knowledge of the cannon shot rule not from that source, but from French maritime practice, with which his official position made him well acquainted.

A few years before Valin wrote (1750), there is evidence in the work of J. J. Surland that the cannon shot rule was known to German writers of the day.[1] Hubner, too,[2] is familiar with the rule, though as a zealous partisan of neutral rights he favoured a more extended area of protection. But in the more widely known work of Christian Frederick Wolff, written about the same period, the rule does not appear.

Vattel[3] follows the same general lines as Wolff and Pufendorf. But after discussing wider claims, such as those of England in the British Seas, and those of Venice in the Adriatic, and concluding that such claims are respected as long as they can be maintained by force, he concludes: "Aujourdhui tout l'espace de mer qui est à la portée du canon le long des côtes est regardé comme faisant partie du territoire, et pour cette raison, un vaisseau pris sous le canon d'une forteresse neutre, n'est pas de bonne prise". Vattel may mean here only to assert the existing rule. But the passage can also be read as the development of a theory of a maritime belt a cannon shot broad all along the coast, the case of a capture under the actual guns of a fortress being used merely as a particular instance of a general principle which had been in numerous cases denied in practice by States which accepted the old *portée du canon* rule.

Up to the middle of the eighteenth century, therefore, though the cannon shot rule had made its appearance in certain juristic writings, there is no trace of the acceptance of the maritime league as either an equivalent for or an alternative to cannon range. Abreu and Valin, as we have seen, had proposed two leagues as an alternative, not as an equivalent but as a mere measurement in sea miles having no relation whatever to the range of cannon. Two leagues is also mentioned in the rather later work of another eminent French writer on maritime law, Emérigon, *Traité des Assurances*,[4] as it is also in the article "Mer" by Merlin in the *Grand Répertoire de Jurisprudence*, 1777.

Measurement in leagues was the principle prevailing in practice in matters relating to customs control. Thus the series of British Hovering Acts in the eighteenth century started with a customs control zone of two leagues from the shore (1736, 9 Geo. II, c. 35), a distance which was gradually increased

[1] Raestad, *op. cit.*, p. 121.
[2] *De la Saisie des bâtiments neutres* (1759), Part I, Chapter 8, section 10.
[3] (1758), Liv. I, Ch. XIII, section 289.
[4] (1783), I, p. 448.

first to four leagues (24 Geo. III, c. 47), and later to eight leagues, before the final abandonment of this legislation and a general acceptance of the principle of the three mile limit for purposes of jurisdiction in the Territorial Waters Jurisdiction Act of 1878.[1]

In French and Spanish commercial treaties and customs regulations during the second half of the eighteenth century two leagues also appears, a limit which has persisted in Spanish practice to a much later date.[2] For customs and sanitary control purposes, most European countries in the second half of the eighteenth century claimed limits of control in leagues or similar measures. Coastal fishery regulations also tended to measure the area of control by a prescribed distance from the coast in miles or leagues.

These limits, laid down by State ordinances or treaties for customs or fishery control purposes, together with the claims advanced by the Scandinavian Powers, appear, on the face of things, at least as closely connected with the origin of the three mile limit as was the cannon shot rule of Bynkershoek.

No detailed examination can be made here of the diplomatic claims of the Scandinavian Powers in the eighteenth century with regard to territorial waters. These probably deserve more attention than has hitherto (in the English language, at any rate) been given to them.

In the Danish-Dutch dispute of 1740, as has already been noted, just as it was Holland, the home of Bynkershoek, who supported the cannon shot rule, so it was Denmark, true to her point in several other recorded controversies, who claimed a territorial belt measured in leagues. The claim to four leagues had no relation whatever to cannon shot; the doctrine with which it was connected was that of the limit of view. As a Dutch diplomatist said at the time: "I do not believe that there is any cannon in the world that can carry even one league, let alone four leagues". Denmark did not rest her claim upon cannon shot range at all. In 1691, she had not recognized that rule but had based her claim on the older theory which would give protection from capture to a ship within sight from the shore. As sight of land appears to have been considered to be about four to five leagues, the distance claimed by Denmark fifty years later was not substantially different. The claim is for a fixed distance in leagues based on the old visual rule, and involves the acceptance of a maritime belt theory and not that of zones within the range of the guns of a fortress.

Within a few years of the discussions in 1740, we find the Danish claims as to limit of view replaced by the much more modest limit of four miles.[3] In 1743, when Russian fishermen began to appear off the Norwegian coast, the Prefect of Finmarken allowed them, on payment of a tax, to fish up to the distance of one Norwegian league from the shore—a measure endorsed by the Danish King on 10 February 1747. About the same period the distance of a league replaced in prize matters also, in Danish-Norwegian jurisprudence, the former limit of eyesight or four leagues. A royal decree of 18 June 1745 introduces this limit, which is confirmed by a series of dispositions in the latter part of the eighteenth century. And from the end of

[1] Fulton, *op. cit.*, pp. 593–4. For details of The Hovering Acts legislation see Masterson, *Jurisdiction in Marginal Seas* (1929), pp. 1–162.

[2] Raestad, *op. cit.*, p. 130.

[3] Raestad, *op. cit.*, p. 119.

that century it may be said that in Denmark and Norway one league was definitely accepted as the general limit of sovereignty over the sea.[1] But the four league claim continued to be asserted in regard to the Iceland fisheries up to 1836.

There is no reason to suppose that Denmark ever claimed four miles, as against the three miles afterwards accepted by other Powers, on account of the superior range of Danish cannon. The Scandinavian league happened to contain about four miles as against the three mile league in general use elsewhere. It is suggested that in the case of both four mile and three mile limit the standard was taken without any conscious reference to cannon range whatever, simply as one league—a general primary and convenient standard of measurement at sea.

Sweden, also, from 1779 at least, had adopted the Scandinavian league of four miles as the limit of her jurisdiction.[2]

By the middle of the eighteenth century, at a time when France and Southern Europe still adhered to the *portée du canon* rule as the limit of territorial waters for neutrality purposes, Denmark and Sweden already advanced an all purposes rule—a demand for a maritime belt both for neutrality and other purposes extending to at least one marine league's distance from the shore. This would seem to warrant the suggestion that three mile limit and cannon shot rule had perhaps no common origin or real historical connection but were wholly independent of each other, and that it was the Scandinavian principle of the maritime belt of one marine league—a natural and convenient unit of nautical measurement—which ultimately gained the day. It must, however, be admitted on the other hand that the view that the three mile limit was accepted as an agreed distance based on the maximum range that cannon either could then or might possibly be able to carry, is of very respectable antiquity, probably starting with the Italian jurist Galiani (1782) and soon obtaining a wide measure of currency.

That the cannon shot doctrine was at this period securing a measure of acceptance even in Northern Europe is indicated by the work of Moser, a Councillor of State of Denmark in 1778.[3]

Four years later, the three mile limit is for the first time brought distinctly into the literature of international law. The Italian writer Galiani, who had been Sicilian Secretary of Legation at Paris,[4] writing in 1782 (*De' Doveri de' principi neutrali verso i principi guerregianti, e di questi verso neutrali*), states that various opinions had prevailed about the extent of the territorial sea, of which the most certain was that where the coast is not indented by bays but has an ordinary open coastline the area covered by the guns of any battery posted on the shore falls within the territorial jurisdiction of the adjacent land. He then concludes that it would be reasonable not to wait to see what forts a neutral sovereign might erect on a particular spot or what

[1] Royal Ordinances of 7 May 1756, 23 February and 27 July 1759, 10 November 1779: Raestad, *op. cit.*, p. 132, *n.*

[2] See especially Swedish Prize Regulations, 8 July 1788, repeated in the Regulations of 12 April 1808: Raestad, *op. cit.*, p. 132 *n.*: and Jessup, *op. cit.*, 35–6, citing L. S. Von Holstein for Swedish Instructions of 1758 supporting the view that Sweden once claimed a three mile limit. But these instructions seem to have had rather a special basis.

[3] *Versuch des Neuesten Europäischen Völkerrechts in Friedens-und-Kriegszeiten*, vol. V (1778), p. 486, cited by Fulton, *op. cit.*, p. 563.

[4] Fulton, *op. cit.*, p. 563.

calibre of guns he might mount there, but to fix once and for all all along the coast a limit of three miles, as a limit beyond which no cannon could possibly reach.

It does not appear that Galiani is asserting[1] that cannon range had been in the past or even then was identical with three miles. His language suggests that he is taking a convenient standard measure, the marine league, outside the range of then known cannon, but not so far as to be out of all relation to possible developments, and that he is proposing a maritime belt of that extent as a substitute for the old cannon shot rule which required actual cannon in position. Whether it is a mere coincidence that he chose a marine league, at a time when the Powers of the North, in defence of whose Armed Neutrality league he had been employed to write a book, were also claiming a marine league—though a Scandinavian one—does not seem certain. But if it is to the work of any jurist alone that the modern three mile limit is due, the Italian diplomatist of the latter end of the eighteenth century has at least as great a claim as the Dutch jurist of its earlier years.

G. F. De Martens, both in his *Essai sur les Armateurs* (1795),[2] and in his *Précis du Droit des Gens*, accepted the cannon shot rule, though it appears that in the first edition of the *Précis* (1789) a curious error has crept in, making three leagues an equivalent to cannon shot. This is corrected in the second and later editions, which make De Martens say that cannon shot is the accepted minimum distance, but that treaties have in certain cases extended the limit as far as three leagues. Azuni, another Italian author, who wrote in 1795, after dealing with earlier opinions on the question of the territorial sea at some length and advocating a general treaty on the subject by the maritime Powers, follows the conclusions of Galiani almost verbatim.[3]

The view, stated by Galiani, accepting the cannon shot rule but substituting a fixed maritime belt of three miles in lieu of the varying ranges of actual cannon placed on the shore, finds an entrance into diplomatic history in the measures taken by the United States of America on the outbreak of war between England and France in 1793. President Washington issued instructions that, provisionally and for purposes of neutrality, the United States proposed to adopt a maritime belt of three miles at any rate as within their jurisdiction. Jefferson, communicating this decision to the British Minister, and adverting to the fact that disagreement had existed on the subject, states: "The greatest distance to which any respectable assent amongst nations has at any time been given is the extent of the human sight, estimated at upwards of twenty miles, and the smallest distance, I believe, claimed by any nation whatever, is the utmost range of a cannon ball, usually stated at one sea league."[4] Jefferson may have been basing his statement on the words of writers such as Galiani, but the way in which he expresses himself gives rise to doubt whether the rule of one sea league originated with that author,

[1] "Mi parebbe peraltro ragionevole, che senza attendere a vedere se in atto tenga il sovrano del territorio construtta taluna torre o batteria, e di qual calibro di cannoni la tenga montata, si determinasse fissamente, e da per tutto la distanza di tre miglia dalla terra, come quella, che sicuramente e la maggiore ove colla forza della polvere finora conosciuta si possa spingere una palla, o una bomba" (at p. 422).

[2] Chapter II, section 18, p. 66.

[3] (2nd ed., 1796), Ch. I, Art. 4, sec. 15, p. 67.

[4] Moore, *Digest*, vol. I, p. 702.

or whether the Italian jurist merely put upon paper opinions already held in the diplomatic world of his day.

Up to the time of the French Revolutionary Wars, then, it may be said that, whereas the practice of the Scandinavian Powers had adopted the maritime league of four miles for purposes of territorial jurisdiction, Southern Europe in general for neutrality purposes accepted the more restricted rule of cannon shot range. Thus the *portée du canon* rule is applied in the Declaration of Neutrality of the Grand Duke of Tuscany of 1 August 1778; of the Pope, 4 March 1779; of Genoa, 1 July 1779; and of Venice, 9 September 1779. But in the closing decade of the eighteenth century the transition from cannon shot to three mile limit, though still far from complete, had clearly begun. Though France, even at the end of the Napoleonic Wars, had not yet pronounced clearly for the acceptance of the three mile limit as equivalent to cannon shot range, it had been received as such in the prize courts both of Great Britain and of the United States.[1]

The old Italian limit of 100 miles had been definitely abandoned even by the theorists, while the limit of view was almost obsolete. Cannon shot was being absorbed into a wider limit measured in miles, which resembled closely the limits for which the Scandinavian Powers had contended in that it laid down a definite uniform maritime belt of three miles and required no actual cannon posted on the shore.[2]

IV

It thus appears that though Bynkershoek was apparently the earliest jurist to record in a treatise upon questions of international law the existence of the cannon shot rule, he was by no means its originator. That rule was already well known and appealed to as law by diplomatists before Bynkershoek wrote. Bynkershoek restated the rule and accepted it as a general principle, applicable not merely to questions of neutrality in time of war. In this extension of the more generally received scope of the rule he may not have been entirely original—there are traces that in Holland at any rate attempts so to apply it had already been made. But the instances recorded in practice in which the cannon range principle was invoked are nevertheless almost all cases of alleged violation of neutral waters in time of war. It is questionable whether the doctrine which Bynkershoek himself approved differed essentially or was any more extensive than that supported in practice by the Governments of France and other States. His words are consistent with the French doctrine that an actual cannon posted on the shore was necessary—where there was no cannon there was no "armorum vis". The result of that doctrine is not the creation of a general principle that a State has jurisdiction over a maritime belt extending seawards from its shore up to the extreme range of any known cannon, but the recognition of a right of protection in a series of fortress areas or zones covered by the actual guns of forts on shore.

The old cannon shot rule thus differs radically from its successor, the three

[1] E.g. Sir W. Scott in *The Twee Gebroeders* (Alberts, Master), (1800) 3 C. Rob. 162; *The Twee Gebroeders* (Northolt, Master), (1801) 3 C. Rob. 336; *The Anna* (1805) 5 C. Rob. 373; and Story J. in *The Brig Anne* (1812) 1 Gallison, 62.

[2] Further information as to the transition to the three mile limit in the early nineteenth century can be found in Fulton, *op. cit.*, pp. 576 *et seq.*

mile limit rule. In the time of Bynkershoek cannon range was considerably less than three miles. Whether it had even reached that extent in 1782, when Galiani suggested a uniform belt of three miles as a substitute for cannon shot, is doubtful. The three mile rule does not make its appearance in the literature of international law until 1782, and within a few years of that date cannon shot and three miles were being widely treated as equivalents. This may mean that during the closing twenty years of the eighteenth century the cannon shot rule obtained general acceptance, but was converted into a measured distance of three miles, which is the view which has hitherto received the wider acceptance. However, the two rules were very distinct in their nature, and may well have been equally distinct both in origin and development.

In the eighteenth century the cannon shot rule was the one which prevailed in matters relating to maritime neutrality in France, Spain and Southern Europe, but the Northern maritime Powers had never accepted so narrow a limit to their jurisdiction. A generation before the three mile limit makes its entry into the works of international publicists in Southern Europe, the Scandinavian Powers were already claiming jurisdiction over a maritime belt to the extent of one marine league—reckoned at about four miles—from the shore. Even outside Scandinavia, customs, sanitary and fishery control regulations tended to claim jurisdiction over areas measured in leagues from the shore, well outside cannon range. The question may fairly be asked: Was the three mile limit merely cannon shot range converted into mileage, or is its origin more truly to be sought in the practice of States in Northern Europe, or elsewhere? The historical identification of cannon range with the three mile limit does not carry complete conviction. May not that identification have been little more than a fiction of eighteenth-century jurists striving to combine, reconcile and explain divergent practices, and to secure for the future a more practical working rule? In its nature the three mile rule looks like a wholly independent growth from the cannon range rule, and one which, so far from being the direct descendant of the earlier rule, might more properly be regarded as its supplanter. Cannon range, the old war rule of the eighteenth century, though living on in the maritime ordinances of certain Powers, in the early years of the nineteenth century gave way to a rule springing more directly from pacific and economic roots; and the maritime belt of three marine miles took its present place on the statute book of the modern maritime world.

THE TRANSFER OF CHATTELS IN THE CONFLICT OF LAWS[1]

By J. H. C. MORRIS, B.C.L., M.A.
Fellow of Magdalen College, Oxford

I

THE purpose of this article is to consider what law governs the transfer of title to chattels[2] in the conflict of laws in two distinct situations:

(A) When chattels situate in one State are transferred in another,
(B) When chattels are taken out of one State by someone not the owner and dealt with in a second State.

The English law on this subject is rudimentary in the extreme. The cases are scanty, old and inconclusive. There is only one case in which the problem was squarely considered, but that case, besides being some eighty years old, turned on very special facts.[3] In the United States the problem has been worked out in a large number of cases which are, however, difficult to reconcile.

Writers on the conflict of laws have at various times considered that three possible laws can claim to govern these transactions, namely the law of the owner's domicil (*lex domicilii*), the proper law of the transfer (*lex actus*), and the law of the place where the chattel is situated (*lex situs*). It is proposed to consider the claims of each of these laws from a theoretical standpoint.

(1) *The lex domicilii.* The early Continental writers laid down the maxims "*Mobilia sequuntur personam*" and "*mobilia ossibus inhaerent*" and applied them to the transfer of chattels. The maxims mean that chattels wherever situated are deemed to follow the law of the owner's domicil. This is a useful rule for general assignments, and is applicable to-day, broadly speaking, to general assignments made on marriage and on death, since it would obviously be undesirable that each single item comprised in a marriage settlement or an inheritance should devolve in a different way. But it by no means follows that the same rule should be applied to the transfer of single movables. It may have been true in early times that articles of personal estate were few and were usually located in the owner's domicil. It is entirely untrue in modern commerce. As Beale says: "The picture of a horse or a library of books following the owner about from place to place is not one which has legal connotations".[4] Accordingly, all modern writers have discarded the

[1] I am indebted to Professor G. C. Cheshire, of All Souls College, Oxford, who read this article in manuscript and made many valuable suggestions, and to my former pupil, Dr. A. H. Robertson, who discussed many of these problems with me in 1940.

[2] The term is here used to exclude intangibles and negotiable paper. Questions relating to capacity to transfer and the formalities of transfer are also excluded.

[3] *Cammell* v. *Sewell* (1860) 5 H. & N. 728. The earlier cases of *Inglis* v. *Usherwood* (1801) 1 East 515 and *Freeman* v. *East India Co.* (1822) 5 B. & Ald. 617 are so ancient that their value as authorities to-day is small. *Alcock* v. *Smith* [1892] 1 Ch. 238 and *Embiricos* v. *Anglo-Austrian Bank* [1905] 1 K.B. 677 are also omitted from this discussion, because they deal with the transfer of negotiable paper.

[4] *Treatise on the Conflict of Laws*, p. 979. Cf. Wolff, *Private International Law*, p. 518. "Of an artificial set of teeth it may indeed be said that such *mobilia ossibus inhaerent*; but questions of conflict of laws do not arise in respect of them".

domiciliary test, though echoes of it are still to be found in modern cases.[1] Great as is the importance of domicil in family law, it has little significance in commercial matters, except perhaps as an element in determining the proper law of a transaction.

(2) *The lex actus.* By this is meant the law of the State with which the transaction has the closest and most real connection, that is the proper law of the transfer, not necessarily the law of the State in which the transfer takes place. The claims of the *lex actus* are most obvious when a transfer is made in one State of chattels situated in several States, or when the situs of the chattels is unknown because they are in transit. Moreover, a transaction may be ineffective as a transfer but effective by the *lex actus* as an executory contract to transfer. But the claims of the *lex actus* are not so obvious when there are two independent transfers, for example when the title to goods is disputed between an unpaid seller and a pledgee from the purchaser, and the sale and pledge took place in different States. To say that the *lex actus* regulates such competing claims is clearly not to solve the problem. An equally serious objection to the *lex actus* is that a problem may arise although there has been no "transaction" at all. For instance, A finds a ring in State X, takes it to State Y, and possesses it there for a period sufficient to bar the owner's title by the law of State Y, but not by the law of State X.

(3) *The lex situs.* A rule which regulates disputed questions of title to goods by the law of the place where the goods are situated has obvious practical advantages, since in the last resort this law is the only one which has physical control over the goods. Accordingly the majority of English and American courts and writers (with the exception of Professor Cheshire, whose views are considered below) prefer the *lex situs* to any other law. "I do not think", said Maugham J.,[2] "that anyone can doubt that with regard to the transfer of goods, the law applicable must be the law of the country where the movable is situated. Business could not be carried on if that were not so". "The rule which looks to the law of the *situs*", said Swayze J.,[3] "has the merit of adopting the jurisdiction which has the actual control of the goods and the merit of certainty". The difficulty is, however, that the *situs* of movables may be casual and may be changed by a wrongful act. For instance, a ship may be in a foreign port; a bale of cotton may be crossing a State line in a railway wagon; a ring may be stolen and taken to a foreign State. If the *situs* changes, it is no solution to say that the *lex situs* governs: we require to know which *lex situs* to apply.

II

It is convenient here to consider the distinctions and rules laid down by Professor Cheshire, for he has done more than any other English writer to elucidate this difficult subject, and his treatment marks a notable advance from the jejune and contradictory rules of Dicey.[4] Professor Cheshire states

[1] E.g. *Liverpool Marine Credit Co.* v. *Hunter* (1868) L.R. 3 Ch. App. 479; *Dulaney* v. *Merry* [1901] 1 Q.B. 536; *Republica de Guatemala* v. *Nunez* [1927] 1 K.B. 669.

[2] *In re Anziani* [1930] 1 Ch. 407, 420.

[3] *Lees* v. *Harding, Whitman & Co.* (1905) 68 N.J. Eq. 622, 629.

[4] Rules 152 and 154.

that the problem "may present itself in at least three forms", which he analyses as follows:[1]

"First it may arise between the actual parties to a transfer, as for instance where an assignment made in London of goods situated in Paris would be valid by English law but void by French internal law."

"Secondly, it may arise between one of the original parties to the transfer and a third person who claims to have derived some right in the goods from the other original party."

"The problem arises in the third form where, though there has been some previous dealing with the goods between A and B, the claim is made by a third person C who relies upon some later independent transaction quite unconnected with the earlier one between A and B."

Professor Cheshire lays down the following rules for these three situations:[2]

> " (i) Any question relating to the validity, effect or interpretation of the transfer which concerns only the original parties thereto is governed by the *lex actus*, i.e. by the proper law of the transfer."
>
> " (ii) A title to goods claimed to have been derived from one of the parties to a transfer must be determined by the *lex actus* of the original transfer."
>
> "(iii) A title acquired by A in accordance with the existing *lex situs* of the goods prevails over any other title that has been acquired under some previous *lex actus* or some previous *lex situs*."[3]

It is submitted that Professor Cheshire's three categories are not mutually exclusive and that his rules are self-contradictory. In order to justify this assertion, it is proposed to consider (*a*) the relation between rules (i) and (ii) and (*b*) the relation between rules (ii) and (iii).

(*a*) *The relation between rules* (i) *and* (ii). We may take as our starting-point Professor Cheshire's own illustration of his first type of problem, namely an assignment in London of goods situated in Paris. Now suppose that the assignor is an Englishman and the assignee is a Frenchman, and that before the action is brought the assignee dies and the plaintiff is his personal representative duly appointed under French law. Clearly the issue before the Court is the same as it would have been if the assignee had not died, yet Professor Cheshire would apparently transfer the problem to his second category, because it does not arise "between the actual parties to the transfer", but between "one of the original parties and a third person who claims to have derived some right in the goods from the other original party". The same considerations would apply if the assignee became bankrupt and the action was brought by his French trustee in bankruptcy, or if the assignee in France assigned all his interest in the goods to a third party. In all these cases the issue before the Court would be exactly the same, namely, Did the original assignment in London transfer the title in the goods to the assignee? Since the law which Professor Cheshire says is applicable to his first two categories is the same, namely the *lex actus*, it is suggested that the two categories could usefully be merged into one.

(*b*) *The relation between rules* (ii) *and* (iii). It would seem obvious that

[1] *Private International Law*, 2nd ed., pp. 415–416. Professor Cheshire tells me that he has now abandoned some of the views there set out.

[2] *Ibid.*, pp. 431–434.

[3] The second half of this rule does not immediately concern us.

these rules are intended to regulate mutually exclusive problems, because rule (ii) says the *lex actus* is applicable, and rule (iii) the *lex situs*. But it is submitted that this is not the case. Let us take by way of illustration Professor Cheshire's hire-purchase problem:[1]

"A motor-car, after being transferred from X to Y in England under a hire-purchase agreement, is taken by Y to France and, before payment of all the instalments, sold by him in Paris to Z who acts in good faith. The domestic law of France denies to X any property in the car as a result of the agreement."

This is claimed to be an example of the third category, and Professor Cheshire's conclusion is (contrary to the weight of American authority) that an English Court would prefer the title of Z to that of X. At first sight this case appears to fall exactly within rule (iii), for Z's title has been "acquired in accordance with the existing *lex situs* of the goods", and accordingly, in Professor Cheshire's opinion, "prevails over any other title that has been acquired under some previous *lex situs* or some previous *lex actus*" (that is, prevails over X's previous English title). But does it not fall equally within rule (ii), under which "a title to goods claimed" (sc. by Z) "to have been derived from one of the original parties to a transfer" (sc. Y) "must be determined by the *lex actus* of the original transfer" (sc. English law)? It is submitted that this case falls equally between rules (ii) and (iii) and that those two rules are therefore self-contradictory, for if rule (ii) applies, English law governs, but if rule (iii) applies, French law governs.[2]

III

It is believed that the best division of the subject-matter is that suggested at the beginning of this article, namely (A) cases where chattels are situate in one State and transferred in another,[3] i.e. cases where the *situs* does not change; and (B) cases where chattels are taken out of one State by someone not the owner and dealt with in a second State, i.e. cases where the *situs* changes.

(A) *Transfers in one State of chattels in another.*

Let us return to the example put by Professor Cheshire and suppose that there is a transfer in London of goods situated in Paris. Suppose further that by the domestic law of France (but not by that of England) delivery is necessary to pass the property to the transferee. Professor Cheshire says that the *lex actus* governs, because "the seller could scarcely be allowed to deny a title to the buyer merely because the actual transfer happened to be

[1] *Op. cit.*, p. 437.

[2] The same analysis can also be applied to the example on p. 416, which is claimed to be an example of the second category, but might equally well be an example of the third, since the trustee in bankruptcy can be considered either as claiming to have derived rights in the goods from one of the original parties to the transfer, or as relying upon "some later independent transaction quite unconnected with the earlier one between A and B". Similarly in *Inglis* v. *Robertson* [1898] A.C. 616 and *Hooper* v. *Gumm* (1867) L.R. 2 Ch. App. 282 (discussed below, pp. 236, 245), it was true that a third party relied upon "some later independent transaction quite unconnected with the earlier one between" the original parties, but it was equally true that the dispute arose between "one of the original parties to the transfer and a third person who claimed to have derived some right in the goods from the other original party".

[3] If the goods are situated and the transfer takes place in the same State, it seems so obvious that the law of that State should apply that this case requires no detailed discussion.

ineffective by French law", and "the seller is contractually bound to pass a good title to the buyer".[1] Now it is of course true that, as between the parties, an assignment may be ineffectual as an executed transfer, but effectual as an executory contract to transfer. But it may be doubted whether this exclusively contractual approach is satisfactory. What we require to know is not whether the contract was valid, but "which of the two systems shall determine whether the property in the goods has passed to the assignee".[2] As soon as a third party is introduced, the difference becomes obvious. Suppose that before the goods are delivered to the assignee, the assignor transfers them in France to C. The title to the goods would seem rather clearly to be governed by French law, and, if that law requires delivery to complete the title, the title would appear to be in C. Of what use is it to tell the original assignee that the assignor is "obliged by the terms of the valid contract to do what is necessary by the *lex situs* to make the transaction complete and effectual"?[3] Fraudulent people are apt to be impecunious, and in such a case the contractual remedy is likely to be worth nothing. The failure of the contractual approach to take us to the heart of the problem appears still more clearly if we assume that the original assignment was by way of gift, for then the assignor would be under no contractual obligation at all to the assignee, and a pure question of title would arise.[4] If the effect of the transfer according to the *lex situs* is not to pass the property to the assignee, Professor Cheshire concedes that "the ownership remains with the seller notwithstanding the contrary rule of the *lex actus*".[3] But this concession cuts most of the ground away from his rule that the *lex actus*, and not the *lex situs*, governs the question whether the property has passed. For the contractual obligation on the assignor to perfect the assignee's title may be either valueless, as when the seller fraudulently delivers the goods to a third party, or non-existent, as when the transfer is by way of gift.

It seems preferable to face the facts and say that the transfer as a transfer must comply with the requirements of the *lex situs* both as regards the necessity of delivery and as regards formalities, since in the last resort the goods cannot be effectively dealt with at all except in accordance with the *lex situs*.[5] The paramount controlling influence of the *lex situs* in cases where the *situs* does not change is well illustrated by two leading cases, one English and the other American. In *Inglis* v. *Robertson*,[6] G, a London wine merchant, bought whiskey from the respondents, who were wine and spirit merchants in Glasgow. The whiskey was stored in a bonded warehouse in Glasgow,

[1] *Op. cit.*, p. 421. [2] *Op. cit.*, p. 416. [3] *Op. cit.*, p. 432.

[4] This was the situation in the intriguing case of *Cochrane* v. *Moore* (1890) 25 Q.B.D. 57, where there was a gift in London of one-fourth of a horse situated in France, but unfortunately French law was not pleaded.

[5] At any rate it seems clear that what constitutes delivery must be determined by the *lex situs*: *In re Craven's Estate* [1937] Ch. 423.

[6] [1898] A.C. 616. Cheshire's statement of the facts of this case is a little misleading because he does not mention that the respondents were unpaid sellers, thereby giving the impression that their title arose *subsequently* to that of the appellants. Since the respondents' title arose prior to the appellants' title, the case does not support his rule (iii). Moreover, as we have seen, it might equally well have fallen within rule (ii): above, p. 235.

The Restatement, s. 261, says that where the title to a chattel is embodied in a document, e.g. a warehouse receipt, the validity of a transfer of the chattel depends upon the *lex situs* of the document at the time of the transfer, and not upon the *lex situs* of the chattel. . . . If the House of Lords had taken this view in *Inglis* v. *Robertson*, the case would have been cited here as an illustration of the situation where the *situs* changes: below, pp. 238–247.

and G held warrants from the warehouse company stating that it was held to his order "or assigns by indorsement hereon". He borrowed £3000 from the appellant, an English merchant, and purported to hypothecate the whiskey as security for the loan by indorsing the warehouse warrants to the appellant in England. The appellant did not give notice to the warehouse company as required by Scottish law, the *lex situs*. G having failed to pay the balance of the purchase price to the respondents, they arrested the whiskey in the hands of the warehouse company. The House of Lords held that the respondents' Scottish title prevailed over the appellants' English one, because "the *situs* of the goods was in Scotland".[1] Similarly, in *Green* v. *Van Buskirk*,[2] certain iron safes in Illinois were mortgaged in New York. Two days later, before possession was delivered to the mortgagee, they were attached in Illinois by a creditor of the mortgagor who obtained a judgment in his favour. By Illinois law mortgages of chattels were void against third parties unless recorded. The mortgagee sought to assert his rights in New York, but the Supreme Court of the United States held that since the *lex situs* (Illinois law) governed, the New York courts must give full faith and credit to the Illinois judgment.

If the reason for the *situs* rule is that in the last resort only officials appointed by the courts of the *situs* can lawfully and effectively deal with the goods, it ought logically to follow that *so long as the situs does not change*, the *lex situs* should mean for a court not sitting at the *situs* of the goods whatever system of law the courts of the *situs* would apply. Suppose that an Italian in London assigns goods situated in Paris to another Italian. It has hitherto been assumed that the English Court should apply French law, because only French officials can lawfully control the goods so long as they remain in France. But suppose that the French courts would apply the domestic rule of England, because the assignment was made there, or of Italy, because the parties were domiciled there, then it is clear that the object of the *situs* rule will not be attained unless the English Court will do the same. This reasoning has been applied to problems arising from the transfer of immovables,[3] but it seems equally applicable to problems arising from the transfer of movables, so long as the *situs* does not change. If this reasoning is sound, it follows that the reason for the *situs* rule has no application if the court is itself sitting at the *situs* of the goods. Moreover, the *situs* rule itself furnishes no guide whatever to a court sitting at the *situs* unless it is first assumed that the word "law" in the rule means (contrary to its meaning when other courts apply it) the domestic rule of the *situs*. It is submitted that if the court is sitting at the *situs* of the goods, there is nothing to prevent it from applying some law other than the domestic rule of the *situs*, for instance the *lex actus*. Suppose that the English Court has to consider the effect of a transfer made abroad of goods situate in England, and that the transfer does not comply with the formalities prescribed by an English statute. It is suggested that the English Court should consider the statute in the light of its underlying purpose and the commercial consequences of a decision one

[1] [1898] A.C. 616, 625, *per* Lord Watson (the only Lord who dealt with the conflicts aspect of the case).

[2] (1886) 5 Wall. 307, 7 Wall. 139.

[3] Cf. Cook, *Logical and Legal Bases of the Conflict of Laws*, pp. 264, 279–280; Falconbridge, 17 C.B.R. 392–3, 19 C.B.R. 333, 20 C.B.R. 111; Griswold, 51 H.L.R. 1202.

way or the other, in order to decide the question whether it applies to transfers made outside England. This is substantially what happened in *Dulaney and Son* v. *Merry*,[1] where two Americans executed a deed in Maryland purporting to assign all their property wherever situate to another American for the benefit of their creditors. The deed was valid by the law of Maryland, but it was not registered in accordance with the English Deeds of Arrangement Act, 1887. The English Court held that chattels in England passed under the deed in spite of the absence of registration. The reasoning may be open to criticism,[2] but the result seems entirely consistent with principle.

It would be easy to multiply examples in order to show that the *situs* rule is not a satisfactory test in all circumstances. The *situs* of goods may be entirely casual, as when a cargo ship bound from the Orient to England puts into a Mediterranean port. Or it may even be unknown to the parties to a transfer, as when goods are in a railway train.[3] Perhaps it is the inability of the *situs* rule to furnish an appropriate test in such circumstances which has led Professor Cheshire (almost alone among modern writers) to abandon it. It is suggested however that all that is necessary is to modify the *situs* rule instead of abandoning it altogether. It is submitted that the necessary flexibility would be furnished if the rule were laid down that the validity of a transfer in one State of chattels situated in another is governed by the proper law of the transfer, that is, by the system of law with which the transfer has the closest and most real connection, and that the proper law of the transfer is presumed to be (but is not necessarily) the *lex situs* of the goods. This is merely the *situs* rule raised to a higher power.

IV

(B) *Questions arising when chattels are removed out of the State.*

Stated in its widest terms, the type of problem which requires elucidation here arises when chattels are taken out of one State by someone not the owner and dealt with in the second State in such a way that it is claimed that the owner's title is lost. The laws of the two States may agree that the owner does or does not lose his title, in which case no problem in the conflict of laws is presented; or they may differ. Usually they differ in that the law of the second State says the owner's title is lost, while the law of the first State says the owner retains his title. But sometimes it is the other way about, and therefore we must deal with each situation separately.

(1) *Where the law of the second State says the owner's title is lost.*

Suppose that A steals B's watch in Scotland and sells it in market overt in England; or that A finds B's ring in State X, takes it to State Y, and possesses it there for a period sufficient to bar B's title by the law of State Y, but not by the law of State X; or that A hire-purchases a car from B in England on the terms that title is to remain in B until the price is fully paid, and A takes the car to France and sells it to a purchaser; or that A mortgages a ship to B in State X, and takes it to State Y where it is seized by

[1] [1901] 1 Q.B. 536.

[2] Cheshire, *op. cit.*, p. 433.

[3] Cf. Wolff, *Private International Law*, pp. 528–30, and Hellendall, *The Res in Transitu in the Conflict of Laws*, 17 C.B.R. 7, 108 (1939).

A's creditors. Suppose further that in each of these situations, if all the events had occurred in the first State, B would have retained his title, but that if they had all occurred in the second State, B's title would have been lost. It is obvious that these cases all present difficult problems in the conflict of laws. The solution of them has been thought at various times to depend upon a number of distinctions. First, there is the distinction between cases where the chattel is removed out of the State with the owner's consent, and cases where the removal is without the owner's consent. Secondly, there is the distinction between cases where the chattel is sold in the second State to a purchaser, and cases where it is attached by the remover's creditors. Thirdly, there is the distinction between creditors who claim a lien on a specific chattel, and creditors who merely seek to exercise a general right of execution against what they believe to be their debtor's property. Fourthly, it may be material to consider whether the purchaser or creditor acted in good or bad faith, that is, whether he knew or ought to have known that the remover from whom he claims title was not the true owner of the chattel.

An alarming vista of apparently endless permutations and combinations is thus opened. The policy of the law in any particular case may be in favour of the security of titles, in which case the owner will retain his ownership, or it may be in favour of the security of transactions, in which case he will lose it. The conflict between these two policies produces problems in the domestic field which are difficult enough, but in the conflicts field they seem at first sight to be insuperable, because the forum may have to balance the policy of the law of State X in favour of the security of titles against the policy of the law of State Y in favour of the security of transactions: and if the conflicting policies are those of different States, by what criterion can the forum determine which is the weightier in the particular case? Nevertheless it is believed that each and every one of these problems can be solved along common sense lines by asking one simple question, namely, *why does the law of the second State say that the owner's title is lost?* It may do so for one of two reasons: either because it regards the events which occurred in the second State as overriding all former titles, either wholly or partially; or because if all the events had occurred in the second State it would not have regarded the owner's reservation of title as effective. In the former case it is submitted that the law of the second State should govern and that the owner's title should be subordinated to or extinguished by that of the purchaser or creditor. In the latter case it is submitted that the law of the first State should govern and that the owner's title should prevail. It is further submitted that this result is consistent not only with common sense but also with most of the American and English cases.

(*a*) *Where the law of the second State shuts out prior titles.* The cases decided under this head are not numerous, but they seem very clearly to support the view presented above. Thus, in the well-known English case of *Cammell* v. *Sewell*[1] the owner of the deals lost his title to them because the sale in Norway shut out all prior titles, even though a sale under similar circumstances in England would not have had this effect. The Court intimated that a similar result would be reached if the goods of a foreigner were sold in England in market overt. In the early American case of

[1] (1860) 5 H. & N. 728. Cf. *Alcock* v. *Smith* [1892] 1 Ch. 238, 267, *per* Kay L.J.

Waters v. *Barton*[1] there was a parol gift of slaves in Tennessee which was void by the law of that state, and did not pass the property in the slaves to the donee. The donee removed the slaves to Texas with the owner's consent. After the running of the Texas (but not the Tennessee) period of prescription, the slaves were enticed back to their original owner in Tennessee. The Tennessee Court held that his title had been extinguished. The decision is clearly right and should, it is submitted, be followed in England whether the effect of the Statute of Limitations is to extinguish the original owner's title or merely to extinguish his remedy. In the modern American case of *Universal Credit Co.* v. *Marks*,[2] a motor car was hire-purchased in New York on the usual terms that title was to remain in the seller until the price was fully paid, and that the car was not to be taken out of the state. In breach of his contract and without the owner's consent, the buyer took the car to Maryland, where it was repaired by a garageman. The garageman claimed under Maryland law that he had a lien on the car for the cost of the repairs. The Maryland Court held that the garageman's lien took priority over the owner's title. The decision seems entirely correct, for commercial convenience surely requires that a contractor who does necessary work on a chattel should be entitled to be paid for it, irrespective of where the title to the chattel lies, if the law of the place where the work is done gives him such a right. You cannot expect a repairer to investigate the title to the chattel before starting work.

A distinction is drawn by Beale[3] between liens which increase the value of the chattel (e.g. repairer's liens) and liens which do not (e.g. warehousemen's liens). He suggests that the former should and the latter should not take priority over the owner's title. Under the view presented in this article, it would be entirely a matter for the law of the second State to determine which particular liens should take priority over the owner's title. Only if the law of the second State made such a distinction would it be relevant.[4]

Effect of bad faith on the part of the purchaser. According to the view presented here, it would be entirely a matter for the law of the second State to determine what effect bad faith on the part of the purchaser has on the question whether the owner's title is extinguished. If the law of the second State is that the owner's title is shut out even if the purchaser knew of his existence, it is submitted that the forum should accept the situation. In English law there are many situations in which a possessor of goods may acquire a good title to them by lapse of time, although he knows that he is not the true owner. The same result should follow even if the owner is a foreigner.

Effect of lack of consent on the part of the owner. Beale has advanced the proposition that if a chattel is taken into a State without the consent of the owner, such State has no power to affect his title to the chattel unless it has

[1] (1860) 1 Cold. 450.

[2] (1932) 164 Md. 130. Cf. *Willys-Overland Co.* v. *Evans* (1919) 104 Kan. 632.

[3] *Treatise*, s. 279. 2.

[4] The distinction seems unsound in principle, because it ignores the fact that repairers' liens are not generally limited to the extent to which the repairs have increased the value of the chattel, but include also the repairer's profit. Moreover, the suggested distinction would involve awkward problems if a car were delivered to a garageman both for safe custody and for repairs.

personal jurisdiction over him.[1] But as Cook points out,[2] sweeping assertions about the "power" of sovereign States, supposed to be deduced from territorial theories about the nature of law, are seldom borne out by the facts. Some very surprising results would follow if Beale's proposition were true,[3] and nowhere are the results more surprising than in the branch of law we are now considering. If the Maryland garageman's lien in *Universal Credit Co.* v. *Marks*[4] prevailed over the owner's title no matter who the owner was, surely it would and should *a fortiori* prevail although the owner had not consented to the removal of the car to Maryland. If a watch were sold in market overt in England, it seems unlikely that an English Court would deny title to the buyer merely because the Pennsylvania owner had not consented that the watch should be taken to England. As Crompton J. convincingly put it in *Cammell* v. *Sewell*,[5] "We do not think that the goods which were wrecked here would on that account be the less liable to our laws as to market overt, or to the landlord's right of distress, because the owner did not foresee that they would come to England". It is submitted therefore that in the type of situation so far considered, it is entirely a matter for the law of the second State to determine whether the owner's lack of consent makes any difference; and if it does not, the owner should lose his title.

It will be noticed that so far the results suggested are in accordance with Professor Cheshire's third rule. But as we shall see this is not the case in the type of situation next to be discussed.

(*b*) *Where the law of the second State does not shut out prior titles but denies the efficacy of the owner's reservation of title.* Very different considerations apply to this situation. We shall do well to remember that the general principle of law is *nemo dat quod non habet*, and that the exceptions which have been grafted on to this principle in the interests of commercial convenience are, after all, only exceptions. It is submitted that if a chattel is removed from State X to State Y, and is subjected to a transaction in Y (e.g. a sale to a purchaser or an attachment by creditors) which by hypothesis cannot be referred to any of the exceptions allowed by the law of Y to the *nemo dat* principle, the analysis ought to be as follows: "Here is a transaction which by the law of Y passes the property to the transferee only if the transferor was the owner; it is claimed that the transferor was not the owner because of some earlier transaction in X; it is therefore necessary to inquire whether by the law of X the ownership is really outstanding".

It is believed that the majority of English and American decisions have reached this result, though not necessarily by this method. The American cases are far more numerous than the English ones, and are mostly concerned with chattel mortgages and conditional sales (hire-purchase). As the principle is the same in both these situations, it seems unnecessary to consider them separately.[6] The typical situation in the American cases is that chattels are validly mortgaged or hire-purchased in State X, taken by the mortgagor or hire-purchaser (conditional vendee) into State Y, and there seized by his

[1] *Treatise*, pp. 292–300, citing *Edgerly* v. *Bush* (1880) 81 N.Y. 199.
[2] *Logical and Legal Bases of the Conflict of Laws*, pp. 7–21.
[3] Goodrich, *Handbook of the Conflict of Laws*, 2nd ed., pp. 412–14.
[4] *Supra*, p. 240.
[5] (1860) 5 H. & N. 728, 745.
[6] Cf. Stumberg, *Conflict of Laws*, p. 361

creditors or sold to a purchaser. The weight of authority prefers the title of the mortgagee or conditional vendor to that of purchasers from or creditors of the mortgagor or hire-purchaser.[1] The result is usually the same even if a statute in State Y requires chattel mortgages or conditional sales to be recorded in the State: the recording statutes are generally interpreted as applying only to chattel mortgages or to conditional sales made within the State, and not to mortgages or sales made in another State.[2]

Without attempting an exhaustive analysis of the American cases, a few illustrations from leading cases may be given. In *Longworthy* v. *Little*[3] a horse and buggy wagon were validly mortgaged in New York and the mortgage was recorded there. The mortgagor took the property to Massachusetts where it was attached by Connecticut creditors of the mortgagor, who did not know of the mortgage. The creditors were not relying on any paramount lien; they were simply seeking execution against property which apparently belonged to their debtor. The mortgage was not recorded in Massachusetts as required by the law of that state. Hence if all the events had occurred in New York, the mortgagee's title would have prevailed, because the mortgage was recorded there; but if they had all occurred in Massachusetts, the creditors would have been preferred unless the mortgage had been registered. The Massachusetts court held that the mortgagee's title must prevail.

A similar result was reached in the more recent case of *Hart* v. *Oliver Farm Equipment & Sales Co.*,[4] where a chattel mortgage and conditional sales contract covering chattels in Texas was executed and recorded in that state. Without the knowledge of the mortgagee-vendor and in violation of the contract the chattels were removed to New Mexico. The contract was not filed in New Mexico though there was a recording statute in force in that state. Attachment was levied by a New Mexico creditor. The mortgagee-vendor successfully intervened to assert his superior title. The court refused to follow two earlier cases where a contrary result had been reached.[5]

The principle is exactly the same in hire-purchase (conditional sales) situations. One of the clearest and most striking illustrations of this type of case is *Goetschius* v. *Brightman*.[6] A Californian corporation in that state sold a car to one Oesting, a resident of the state, on the terms that title should

[1] Goodrich, *Handbook*, pp. 414–21.

[2] This notion, though it serves to explain the result, finds little concrete support from the language of the courts. See 50 H.L.R. 522, 1154.

[3] (1853) 12 Cush. 109. Accord: *Offutt* v. *Flagg* 10 N.H. 46; *Ferguson* v. *Clifford* 37 N.H. 86; *Cobb* v. *Buswell* 37 Vt. 337; *Lathe* v. *Schoff* 60 N.H. 34; *Parr* v. *Brady* 8 Vroom. 201; *Wray Bros.* v. *H. A. White Auto Co. of Memphis* (1922) 155 Ark. 153; *General Credit Co.* v. *Rohde* (1936) 122 Conn. 100; *Smith* v. *McLean* (1913) 93 Neb. 707; *Yund* v. *First National Bank of Shawnee* (1905) 14 Wyo. 81; *General Motors Acceptance Corp.* v. *Nuss* (1939) 195 La. 209.

[4] (1933) 37 N. Mex. 267.

[5] *Union Securities Co.* v. *Adams* (1925) 33 Wyo. 45; *Forgan* v. *Bainbridge* (1928) 34 Ariz. 408. In both these cases the court refused to recognize the mortgagee's Texas title, on the dubious ground that Texas courts prefer local purchasers and creditors to mortgagees from other states. The conflict of laws is not, however, a suitable medium for enforcing a policy of retorsion: cf. Goodrich, *Handbook*, pp. 419–20.

[6] (1927) 245 N. Y. 186. Accord: *Cleveland Machine Works* v. *Lang* (1892) 67 N.H. 348; *Clyde Iron Works* v. *Frerichs* (1913) 203 F. 637; *Drew* v. *Smith* (1871) 59 Me. 393; *Barrett* v. *Kelly* (1894) 66 Vt. 515; *Baldwin* v. *Hill* (1896) 4 Kan. App. 168; *Lees* v. *Harding, Whitman & Co.* (1905) 68 N.J. Eq. 622; *Studebaker Bros. Co.* v. *Mau* (1905) 13 Wyo. 358; *Adams* v. *Fellers* (1911) 88 S.C. 212; *Lane* v. *J. E. Roach's Banda Mexicana Co.* (1911) 78 N.J. Eq. 439; *Overland Texarkana Co.* v. *Bickley* (1922) 152 La. 622; *Harrison* v. *Broadway Motor Co.* (1922) 128 Miss. 766; *Reising* v. *Universal Credit Co.* (1935) 50 Ohio App. 289.

remain in the seller until the purchase price was fully paid, and that until then the car should not be removed out of the state. Oesting never paid any instalments but drove the car across the continent to New York without the knowledge or consent of the seller and sold it there to the defendant. By Californian law the seller's title was superior to any title derived from the buyer on resale even to an innocent purchaser for value and even though the contract was not filed. By New York law all such reservations of title were void against subsequent purchasers in good faith unless the contract was filed in New York. The contract never was filed anywhere. Thus, if all the events had occurred in California, the plaintiff's title would have been superior, but if all the events had occurred in New York, the defendant's title would have prevailed. The New York Court of Appeals held that the plaintiff's Californian title prevailed.[1]

In some exceptional situations, American courts have held that the conditional vendor loses his title to a subsequent purchaser or creditor, but these cases are so exceptional that they merely serve to illustrate the general rule. Thus in *Commercial Credit Co.* v. *Higbee*[2] there was a conditional sale of a car in California. The car was removed to Colorado without the knowledge or consent of the vendor and in violation of the contract. The car was attached in Colorado by a creditor of the conditional vendee. The Colorado court held that his title prevailed over that of the conditional vendor, on the curious ground that secret liens are opposed to Colorado public policy. The case merely illustrates the familiar rule that the forum can refuse to apply the law of another State if to do so would be contrary to its public policy. But surely the Colorado court went too far in applying this principle to a transaction which most sister States regard as perfectly valid. In the frequently quoted words of Mr. Justice Beach, "it would be an intolerable affectation of superior virtue for the courts of one State to pretend that the mere enforcement of a right validly created by the law of a sister State would be repugnant to good morals, would lead to disturbance and disorganization of the local municipal law, or would be of such evil example as to corrupt the jury or the public".[3]

Knowles Loom Works v. *Vacher*[4] furnishes a more legitimate exception to the general rule. A Massachusetts corporation sold some silk looms in New York to a New Jersey corporation, on the terms that title was to remain in the seller until the price was fully paid *and that delivery was to be made in New Jersey.* After delivery but before payment of the price the buyer mortgaged the looms in New Jersey to the defendant, who did not know of the seller's existence. By New Jersey law conditional sales had to be recorded in the buyer's county. The New Jersey court gave judgment for the defendant. The case can be supported on the ground that as the looms were at all material times in New Jersey, New Jersey law as the *lex situs* governed the rights of all parties; or on the ground that as delivery was to be made in New

[1] An interesting feature of the case, which did not receive adequate discussion in the judgment, is that the Uniform Conditional Sales Act was in force in New York but not in California. By s. 14 of that Act the sellers' reservation of title is void against certain purchasers and creditors when the property is removed into another State, unless the seller refiles the contract in the second State within 10 days of receiving notice of the removal. The fact that the seller retained his title in spite of this enactment further strengthens the view taken in the text.

[2] (1933) 92 Col. 346. [3] 27 Y.L.J. 656, 662. [4] (1895) 57 N.J.L. 490.

Jersey, the law of New Jersey was the proper law of the original conditional sales contract.

There appears to be no English case dealing with the conditional sales situation. The only English text-writer who has dealt with the problem is Professor Cheshire,[1] whose conclusion (contrary, as he admits, to the weight of American authority) is that the owner loses his title if the chattel is removed into a second State and sold there. It is submitted that an English court ought to come to just the opposite conclusion. The few English cases dealing with the chattel mortgage problem appear to take the same position as the American cases, though they are not so clear-cut and they have been misunderstood. The earliest case is *Simpson* v. *Fogo*,[2] where a British ship was validly mortgaged in England, taken by the mortgagor to New Orleans and seized there by one of his creditors, a Louisiana resident. The Supreme Court of Louisiana decided that the creditor's title prevailed over that of the mortgagee, the internal law of Louisiana not recognizing chattel mortages without delivery of possession. When the ship returned to England, Page-Wood V.C. felt so convinced that by English conflict rules the mortgagee's rights fell to be determined by English internal law that he felt justified in refusing to enforce the Louisiana judgment on the ground that it showed on its face a perverse disregard of English law. Whether the learned Vice-Chancellor was right in refusing to enforce the Louisiana judgment on this ground may be open to serious doubt; but the point which concerns us is that by English conflict rules the mortgagee's rights were governed by English law because the mortgage was made here.

In *Liverpool Marine Credit Co.* v. *Hunter*[3] an opposite result was reached on facts which look similar. A British ship was validly mortgaged in England, taken by the mortgagor to New Orleans, and seized there by creditors of his who were British subjects. In order to procure the release of the ship, the mortgagee gave bonds to the creditors for the amount of their claims. He then filed a bill in the English Court of Chancery for an injunction restraining the creditors from enforcing their bonds. The injunction was refused by Page-Wood V.C., and on appeal by the Lord Chancellor (Chelmsford), but only on very special grounds:

(*a*) The Court could not have restrained Louisiana creditors from attaching the ship in New Orleans, therefore it would not restrain British creditors in New Orleans, because it could not put all creditors on an equal footing; therefore it would not restrain British creditors in England.

(*b*) If the injunction were granted, no British ship would ever again be released in Louisiana on the bond of an English mortgagee, because the Louisiana courts would know that the bond was liable to be set aside in the English Court of Chancery.

(*c*) The creditors owed no duty to the mortgagee. This, it is submitted, is the key to the decision: there was no equity sufficient to justify the peculiarly equitable remedy of granting an injunction to restrain an action at law.

It is therefore submitted that *Liverpool Marine Credit Co.* v. *Hunter* does not shake the authority of *Simpson* v. *Fogo*, which was expressly approved by the Lord Chancellor. Both judgments emphasize that no question of

[1] *Supra*, p. 235. [2] (1863) 1 H. & M. 195.
[3] (1867) L.R. 4 Eq. 62; (1868) 3 Ch. App. 479.

title to the ship was in issue: if it had been, the result might have been different.[1]

Effect of owner's consent to removal of the chattel. We have seen that both in the chattel mortgage situation and in the conditional sales situation the general rule is that the mortgagee or vendor does not lose his title if the chattel is taken into another State. Does it change the case if the owner consents that the chattel shall be removed? Frequently the contract expressly prohibits removal of the chattel out of the State; but sometimes this prohibition is waived, or the contract expressly contemplates removal. At first sight Beale's principle[2] looks more plausible here than it does when the law of the second State operates to shut out prior titles. In domestic situations when courts have to decide which of two innocent parties has to suffer from the fraud of a third, they are sometimes influenced by the fact that one party by his conduct put it in the power of the third party to commit the fraud. It is therefore arguable that in conflict situations the owner ought to be deprived of his title if by consenting to the removal of the chattel he empowered the conditional vendee or mortgagor to deceive innocent purchasers in the second State. Undoubtedly there are American and English cases which can be explained on this ground. Thus in *Hervey* v. *Rhode Island Locomotive Works*[3] the defendant sold a locomotive to C in Rhode Island on the usual terms that title was to remain in the seller until the price was fully paid; but instead of prohibiting the removal of the locomotive out of Rhode Island, the contract expressly contemplated that it should be removed to Illinois. It was so removed and seized in Illinois by a creditor of C. The sale was not recorded in Illinois as required by the law of that state. It was held that the creditor's title prevailed. And in *Hooper* v. *Gumm*[4] ships were mortgaged in Massachusetts with a view to subsequent sales in England. In order to facilitate the sales the mortagor and mortgagee conspired to conceal the existence of the mortgages by not endorsing them on the certificates of registry. A purchaser in England paid the price to the mortagor, who became insolvent before he handed it over to the mortgagee. It was held that the purchaser's title prevailed over that of the mortgagee, on the ground that as the mortgagee had stood by and concealed the existence of the mortgage, he had no equity against the purchaser who had acted in good faith.

The decision in *Hooper* v. *Gumm* is approved by Professor Cheshire,[5] but the American cases denying title to the mortgagee or conditional vendor who consented to the removal of the chattel have been criticized.[6] The point made against them is that it is hard to see how the owner's consent to the removal of the chattel into another State affords any more chance of deception than his consent to its removal into another county in the same State. It is submitted that the best solution to this problem is for the court to inquire whether the owner's conduct would have postponed him to purchasers or creditors if all the events had occurred in the first State. In this way a reasonably common sense solution will be reached and awkward problems in the conflict of laws avoided. According to this view, *Hooper* v. *Gumm*

[1] 4 Eq. 69; 3 Ch. App. 484.
[2] *Supra*, p. 240.
[3] (1876) 93 U.S. 664.
[4] (1867) L.R. 2 Ch. App. 282.
[5] *Op. cit.*, p. 437.
[6] Goodrich, *Handbook*, pp. 416, 420.

need cause no difficulty, since if the court had inquired whether by American (or Massachusetts) law the conduct of the mortgagee would have postponed him to a purchaser in America (or Massachusetts), it must surely have discovered that he would have lost his title. There was therefore no real conflict of laws in *Hooper* v. *Gumm* at all.

V

(2) *Where the first State says the owner's title is lost.*

In all the situations so far considered, it has been assumed that the law of the second State (into which the chattel is removed) accords greater protection to purchasers and creditors than the law of the first State (where the owner parted with possession of the chattel). The reverse side of the usual picture is presented when chattels are taken into a second State and dealt with there in circumstances which deprive the owner of his title by the law of the first State, but not by the law of the second State. A neat illustration is *Marvin Safe Co.* v. *Norton.*[1] The plaintiff company sold an iron safe to Schwartz in Pennsylvania on the terms that the plaintiff was to remain owner until the price was fully paid. Schwartz took the safe to New Jersey and sold it to the defendant, who bought without notice of the plaintiff's rights. By Pennsylvania law the plaintiff's reservation of title was good between the parties, but void as against subsequent creditors or purchasers of the buyer. By New Jersey law the reservation of title was good as against third parties. Thus if all the events had taken place in Pennsylvania, the defendant's title would have prevailed, but if they had all taken place in New Jersey, the plaintiff's title would have been upheld. The New Jersey court in a well-considered opinion held that as the defendant bought the safe in New Jersey, the law of that State applied, and therefore the plaintiff's reservation of title was effective.

An opposite result was reached on similar facts in the later case of *Dougherty & Co.* v. *Krimke.*[2] The plaintiff, a manufacturing jeweller, in New York delivered a diamond to Scull, a broker, for the purpose of contemplated sale, but on the terms that no title was to pass. Scull took the diamond to New Jersey and pledged it there to the defendant. The defendant pleaded the New York Factors Act, under which a factor entrusted with the possession of a chattel for the purposes of sale is deemed to be the true owner so far as to give validity to any contract of sale made by him. Thus if all the events had occurred in New York, the plaintiff would have lost his title, but if they had all occurred in New Jersey, his title would have been upheld. The New Jersey court held that the plaintiff lost his title on the ground that New York law governed the transaction between the plaintiff and Scull, and by that law Scull acquired the "effective title" to the diamond, that is the power to pass the property to a third person.

Thus, in the *Marvin* case the court applied the law governing the transaction in the second State between the conditional vendee and the defendant, and in the *Dougherty* case the court applied the law governing the transaction in the first State between the broker and the plaintiff. The cases appear to

[1] (1886) 48 N.J.L. 410.

[2] (1929) 105 N.J.L. 470.

be in flat contradiction. American writers have criticized the later case on the ground that it is inconsistent with the earlier.[1] The two decisions may, however, be reconciled by assuming that in *Marvin Safe Co.* v. *Norton* the court must have held that the Pennsylvania law only applied to Pennsylvania creditors and purchasers, while in *Dougherty* v. *Krimke* the court must have held that the New York Factors Act was wide enough to cover all third parties and not merely New York ones. According to this view the court should interpret the foreign statute in the light of its underlying purpose and commercial consequences. It is submitted that in most situations commercially more convenient results will be reached by applying the wider interpretation, which the court in effect adopted in *Dougherty* v. *Krimke*. The plaintiff in that case must have known that once he delivered the diamond to Scull, Scull had power by the law of the place of delivery to deprive him of his title. His reservation of title was therefore potentially ineffective, because Scull could have passed a good title to a purchaser in New York. What possible difference could it make if he did so in another State?

VI

Conclusions.

(1) The question whether a transfer in one State of chattels situated in another State passes a good title to the chattels is governed by the proper law of the transfer.

(2) The proper law is presumed to be the *lex situs* because in the last resort only this law can effectively control the chattel.

(3) This presumption may be rebutted if the surrounding circumstances would make it inappropriate to apply the *lex situs*, for instance, because the *situs* of the chattel is casual or not known.

(4) The *lex situs* means, for a court not sitting at the *situs* of the chattel, that system of law which the courts of the *situs* would apply.

(5) The *lex situs* does not necessarily mean, for a court sitting at the *situs* of the chattel, the domestic rule of the *situs*.

(6) If chattels are taken out of one State by someone not the owner and dealt with in a second State in circumstances which by the law of the second State (but not by the law of the first State) deprive the owner of his title, the question depends on the reason why the law of the second State says that the owner's title is lost.

(7) If the law of the second State shuts out all prior titles, the owner's title is lost. It is for the law of the second State to determine the effect of bad faith on the part of subsequent purchasers or of lack of consent on the part of the owner to the removal of the chattel.

(8) If the law of the second State says that the owner's title is lost, not because it shuts out all prior titles, but because it denies the efficacy of the owner's reservation of title, the law of the first State governs and the owner retains his title. It is for the law of the first State to determine the effect of consent on the part of the owner to the removal of the chattel.

(9) If chattels are taken out of one State by someone not the owner and

[1] Goodrich, *Handbook*, pp. 410–11; Stumberg, *Conflict of Laws*, pp. 362–63.

dealt with in a second State, and the owner's reservation of title is effective against third parties by the law of the second State, but not by the law of the first State, it is a question of construction of the law of the first State whether the owner's title is lost. In most situations, commercially more convenient results will follow from a decision that the title is lost.

J. H. C. Morris.

NOTES

THE RELATIONSHIP OF INTERNATIONAL ORGANIZATIONS TO MUNICIPAL LAW AND THEIR IMMUNITIES AND PRIVILEGES

At the end of 1944 the Diplomatic Privileges (Extension) Act, 1944 (7 & 8 Geo. VI, c. 44), received the royal assent. The greater part of this Act was devoted to international organizations.[1] The Act gave to His Majesty in Council the power to apply the Act to any international organization of which the Government of the United Kingdom and foreign governments are members. It then set out the maximum by way of immunities and privileges which could be given by Order in Council to any organization so scheduled and its officials. Within that maximum an Order in Council could fix just how much should be accorded to each organization so as to comply with any obligations which the Crown might have entered into in this respect and in any case to give what was appropriate for the organization concerned. The Act itself specifies this maximum with some particularity.

The organization may be given the legal capacities of a body corporate; that is to say, the power to sue in the courts, to hold property and conclude contracts. It may be given immunity from being sued itself unless it consents. Its property and archives may be made inviolate. Further, diplomatic immunities may be conferred on the representatives of foreign governments, on the governing body or a committee of the governing body of an international organization, and also on a very limited number of its high officials. No diplomatic immunity, however, can be conferred upon any British subject. Then, in order to prevent the immunity from suit of the organization itself being circumvented by action brought against its officials (not possessing diplomatic immunity) in respect of matters done in the course of their official duties, certain other classes of officials may be granted immunity in respect of acts done in the course of their official duties, whether they are British subjects or not. It is not

[1] There is, however, another section (section 3) of some interest from the point of view of international law. It is a section which provides that when an international conference is held in the United Kingdom the Secretary of State may issue a list setting out the names of those persons attending the conference who shall be held entitled to diplomatic immunity. From the point of view of principle, in international law there does not appear to be any reason to doubt that delegates of foreign countries coming to attend an international conference possess diplomatic immunity. On the other hand, though there has long been statutory power to issue a list of those persons who are entitled to diplomatic immunity because they are members of a diplomatic mission accredited to this country, there has hitherto been no such power to issue a list with any legal force as regards representatives of a foreign country who come here in a diplomatic capacity on temporary missions. The best test as to whether a person is entitled to diplomatic immunity is probably that given as long ago as 1921 by Scrutton L.J. in the case of *Fenton Textile Association* v. *Krassin*—38 *T.L.R.* 259—namely, has the person concerned been received in this country by H.M.G. as the representative of a foreign government anent matters of concern between nation and nation? If an international conference is held in this country which is both large in numbers and long in duration, the absence of an authoritative list showing what persons attending the conference possess diplomatic immunity may give rise to difficulties. From the practical point of view it would be regrettable if the question whether a given person possessed immunity was made the subject of a dispute and had to be decided in litigation. While little doubt could arise about the principal delegates, there might be considerable room for doubt about members of their possibly extensive staffs, and claims to diplomatic immunity might well be put forward on behalf of some persons whose position hardly justified it, and the courts might have some difficulty in rejecting the claim. There is, therefore, much to be said for power being given to the Secretary of State to issue an authoritative list both for the purpose of preventing those persons who are entitled to it from having their position questioned and for the purpose of controlling excessive claims.

Lists were issued under section 3 for the first time in connexion with the Preparatory Commission for the United Nations organization.

necessary that all employees of the organization should be given this immunity, but only those whose position is sufficiently responsible to render it feasible to sue them as a means of getting at the organization itself. Finally, all officials and employees of the organization may be granted exemption from income tax on their official salaries provided that they are not British subjects whose ordinary place of abode is in the United Kingdom. Under this Act two Orders in Council have been made applying it to U.N.R.R.A.[1], the Intergovernmental Committee for Refugees, the United Nations Information Organization and the European Advisory Commission.[2] The flexibility of the Act is illustrated by these Orders because it will be seen that there are fewer provisions relating to the European Advisory Commission than to the other organizations. By reason of the nature of the functions of the European Advisory Commission it does not require, for instance, the capacities of a body corporate, whereas the other organizations do. They will require to be able to make contracts, hold property and to take proceedings in court.

It is made obligatory for the Secretary of State to issue lists of those persons on whom diplomatic status is conferred and facultative for him to issue public lists of those persons who are merely given immunity from suit in respect of their official acts. The immunity conferred upon these persons is similar to that enjoyed by consuls, and it has not been the practice to issue such lists of persons enjoying consular immunity. It is perhaps worth mentioning that certain explanations and undertakings were given in Parliament which were all directed to the point that the immunities given should not be abused and lead to the prejudice of private persons in this country. Thus it was stated that undertakings would be obtained from all scheduled organizations that their officials and employees would, if they wished to drive motor-cars, insure against third party risks and that no immunity should be raised to prevent the liability of the insurance company from paying compensation in the case of an accident being determined by the courts if necessary. Further, all immunities were to be capable of waiver by the senior official of the organization and the organization should accept what has already been the rule of the International Labour Office, namely, that immunities are conferred on officials merely for the protection of the organization and such immunity would be waived by the organization in any case where that could be done without prejudice to the organization itself. Finally the organization itself, if it concluded contracts, would insert in those contracts suitable clauses providing for all disputes to be settled by arbitration.

From the legal point of view it is of interest to note that the Attorney-General, in introducing the Bill, explained that where a number of governments joined together to create an international organization to fulfil some public purpose the organization should have the same status, immunities, and privileges as the foreign governments members thereof enjoy individually under the ordinary law. He further expressed the opinion that in principle he considered that they were entitled to it as a matter of international law which the English courts would regard as being part of the common law. Legislation, however, was desirable (1) to put the legal position beyond dispute and prevent unnecessary litigation; and (2) in order to define with precision exactly the extent of the privileges and immunities which should be enjoyed, which would inevitably otherwise remain in doubt. The reason for the Bill was, of course, the coming into existence of a number of new international organizations, some of which would have their offices or be operating in this country. Some of these had in their constituent

[1] S.R. & O., 1945, No. 79.

[2] S.R. & O., 1945, No. 84; a further Order in Council has now been issued relating to the War Crimes Commission and the Provisional European Inland Transport Organization.

instruments articles prescribing immunities and privileges such as those for which the Bill provided, as, for instance, U.N.R.R.A. and the constitution of the Food and Agriculture Organization. Very similar provisions are found in the final Act of the Bretton Woods Conference for the International Monetary Fund and the International Bank for Reconstruction and Development.

Of course, it is not the case that international organizations are only now coming into being for the first time. What is new is their number and variety and the fact that many of them will be operating in the United Kingdom. The League of Nations and the International Labour Organization were both organizations of this character and Article 7 (4) of the Covenant of the League provided for diplomatic immunity of officials of the League. It was, however, necessary for the matter to be arranged in much greater detail between the League and the International Labour Organization on the one hand and the Swiss Government on the other as the country where these two bodies had their seats, and agreements between these bodies and the Swiss Government provided in detail for very much the immunities and privileges which are now prescribed for these new international organizations. There were indeed international organizations older than this; for instance, the European Commission of the Danube, which was established in the middle of the last century, but these older international organizations were not operating in this country.

E.

INTERNATIONAL MONETARY CO-OPERATION

The object of this Note is to inquire into the legal effects which the United Nations Monetary and Financial Conference's Final Act (Cmd. 6546)—the Bretton Woods Agreements—would produce, if and when finally adopted. The work of the Conference was devoted to two main objects, viz., on the one hand, the promotion of "international monetary co-operation through a permanent institution" and, on the other hand, the assistance "in the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes". Accordingly, the Final Act falls into two main parts, namely, "Articles of Agreement of the International Monetary Fund" and "Articles of Agreement of the International Bank for Reconstruction and Development". While it is necessary to deal with both Agreements separately, it is impossible within the available space to do more than to make a broad survey of their outstanding features and to emphasize significant points of principle rather than details.

I

(1) The former Agreement envisages the setting up of an International Monetary Fund which is intended to "possess full juridical personality" and which, in particular, shall be capable of contracting, acquiring, and disposing of property and of instituting proceedings (Art. IX, s. 2); no specific mention is made of the capacity to defend proceedings, but the existence of this power may be inferred from other provisions. The Fund will enjoy immunity to the fullest possible extent. Thus it will not be subject to local process;[1] its property will be exempt from search, requisition, confiscation, expropriation or seizure, and in so far as the purposes of the Agreement require its assets will be free from restrictions,

[1] There is much force in the argument of Mr. Kuhn, *The Bretton Woods Recommendations in the Light of International Law* (Money and the Law, Supplement to the *New York University Law Quarterly Review*, 1945), p. 21, that immunities should not be enlarged "to the extent of placing these institutions outside the realm of competent jurisdiction of domestic courts as to transactions with private individuals and commercial banks". See the same author in *A.J.*, 1944, p. 662.

regulations, controls, and moratoria. Moreover, the Fund's servants will be entitled to a wide measure of immunity, but their legal status has not been given any precise definition.

The Fund will derive its existence exclusively from the treaty; it will not be set up under any specific system of municipal law and will therefore be an international public corporation *stricto sensu*. But it will be a corporation of a unique character for which no analogy is available.

The Fund will have original members, i.e. the "countries" whose governments accept membership before the 31 December 1945, and other members, i.e. the "governments of other countries" who accept membership subsequently on such terms as may be prescribed (Art. II). Each member will have a quota, expressed in millions of United States dollars, which is to be subscribed and paid in full (Art. III); the Agreement does not explain whether the members' liability towards third persons with whom the Fund may contract is limited to the amount of their quota.

The members exercise their rights through the Board of Governors in whom "all powers of the Fund" are vested (Art. XII, s. 2) and whose functions are similar to those of a company's general meeting. The Board of Governors has the privilege of deciding certain fundamental questions such as the admission of new members, the revision of quotas, the distribution of income and so forth. Each member may appoint one Governor. A meeting of the Governors must be held annually and may be held more frequently. Meetings are to be called at the request of five members or by members having one quarter of the total voting power.

The management of the Fund is entrusted to Executive Directors who correspond to the Board of a limited company. They are to "be responsible for the conduct of the general operations of the Fund". They are to be appointed by certain members and "function in continuous session at the principal office of the Fund".

Each Governor as well as each Executive Director will be entitled to cast the number of votes allotted to the member whom he represents, the voting power of each member being 250 votes plus one additional vote for each part of its quota equivalent to 100,000 U.S. dollars. On this basis the United Kingdom will have 13,250 votes, while the British Empire (including the United Kingdom) will have 25,000, the United States 27,750, Russia 13,250 votes, out of a total voting power of 99,000.

Finally there will be a Managing Director who "shall be the chief of the operating staff of the Fund and shall conduct under the direction of the Executive Directors the ordinary business of the Fund." He will be appointed by the Executive Directors, but shall not be a Governor or an Executive Director. He will have no votes except a casting vote at meetings of the Executive Directors.

(2) In so far as transactions between the Fund and its members are concerned, it is not difficult to obtain a clear picture of the activities of the new organization. Speaking generally, the Fund's resources will be used only for the purpose of supplying a member, at its request, with the currency of another member in exchange for gold or for the currency of the member desiring to make the purchase. Dealings with the Fund will be carried out only through the member's treasury, central bank, stabilization fund or similar fiscal agency (Art. V, ss. 1, 2).

Subject to certain conditions a member will be entitled to buy the currency of another member from the Fund in exchange for its own currency; thus the currency must be presently needed for making payments consistent with the Agreement (this seems to exclude, in particular, capital transfers of a certain type—see below); the desired currency may not have been declared scarce; the purchasing member must not have been declared ineligible to use the Fund's

resources. The Fund, however, may at its discretion waive any of these conditions. Moreover, "if it becomes evident to the Fund that the demand for a member's currency seriously threatens the Fund's ability to supply that currency, the Fund . . . shall formally declare such currency scarce". This will entitle the Fund to apportion the supply of the scarce currency "with due regard to the relative needs of members, the general international economic situation and any other pertinent considerations", and will operate as an authorization to any member "temporarily to impose limitations on the freedom of exchange operations in the scarce currency" (Art. VII, s. 3).

On the other hand, a member desiring to obtain directly or indirectly the currency of another member for gold is bound to acquire it by the sale of gold to the Fund, "provided that it can do so with equal advantage" (Art. V, s. 6)—a provision which would involve many complications, if the wording did not make it clear that its application is confined to purchases by members themselves as opposed to purchases by their nationals.

A member will also be entitled and in some cases bound to purchase for gold such of its own currency held by the Fund as exceeds its quota.

(3) In so far as transactions between members and persons other than the Fund (whether they are member states, non-member states or individuals) are concerned, the consequences flowing from the Agreement are so far-reaching that it is a little difficult to visualize all their implications.

The Agreement envisages the introduction of three fundamental principles which require to be stated before their effect can be discussed.

In the first place the currency of each member will have a par value (Art. IV). This will "be expressed in terms of gold as a common denominator or in terms of the United States dollar of the weight and fineness in effect on 1 July, 1944". A change in the par value requires the permission of the Fund. No member shall "buy gold above par value plus the prescribed margin or sell gold at a price below par value minus the prescribed margin" (Art. IV, s. 2). The rates for exchange transactions between the currencies [*sic*] of members taking place within their territories shall not differ from parity by more than a prescribed margin and each member must take the necessary steps to permit within its territory "transactions between its currency and the currency of other members" only within those limits (Art. IV, s. 4).

Secondly, "capital transfers" are subject to severe restrictions (Art. VI). The Fund's resources, it is true, may be used "for capital transactions of reasonable amount required for the expansion of exports or in the ordinary course of trade, banking or other business", and capital movements which conform to the purposes of the Fund and are met out of the member's own resources of gold and foreign exchange are free. But no member "may make net use [*sic*] of the Fund's resources to meet a large or sustained outflow of capital". Members are, therefore, free and, at the Fund's request, bound to exercise such controls as are necessary to regulate international capital movements.

Thirdly, however, there is to be freedom in regard to "current international transactions" (Art. VIII, ss. 2, 4). No member may "impose restrictions on the making of payments for current international transactions". Each member shall, generally, buy balances of its currency held by another member, if they "have been recently acquired as a result of current transactions". The term "payments for current transactions" is defined by Art. XIX as payments which are not for the purpose of transferring capital, and includes "payments due in connexion with foreign trade, other current business, including services, and normal short-term banking and credit facilities; payments due as interest on loans and as net income from other investments; payments of moderate amount for amortization of loans or for depreciation of direct investments; moderate remittances for family

living expenses". The Fund may determine whether certain specific transactions are to be considered as current transactions or capital transfers.

Some legal questions of a general character arise in connection with these provisions.

It is not always clear to what extent the Agreement imposes duties upon the member states only or how far it expects them to make its stipulations obligatory for their subjects. In some cases the members' duty to introduce legislation giving effect to the terms of the treaty is clearly laid down; thus exchange transactions between the currencies of members are to be permitted only on the basis of the par value (Art. IV, s. 4); international capital movements are to be controlled, but current transactions are to be free (Art. VI, s. 3; VIII, s. 2); exchange contracts which involve the currency of any member and are contrary to the exchange control regulations of that member maintained consistently with the Agreement are to be unenforceable in the territories of any member (Art. VIII, s. 2 (b)). But there are many other provisions which raise a doubt. Art. XI, e.g., says that each member undertakes not to co-operate with a non-member or with persons in a non-member's territory in practices which would be contrary to the provisions of the Agreement or the purposes of the Fund. There is no unequivocal answer to the question what duty if any to comply with this rule will have to be imposed upon the members' subjects.

Another problem of importance is involved in the necessity for giving effect to many terms of the Agreement in the territories of the members and harmonizing national regulations with those prevailing in the territories of fellow members. The Agreement is completely silent on this problem, the formidable character of which must be very clear to any lawyer who ever had to deal with international legislation such as the Hague Rules (see the remarks of Bateson J. in *The St. Joseph*, [1933] P. 119, 134, 135). Thus a decision will have to be reached on the question of whether the provisions of the treaty, when incorporated into the municipal systems of law, will be enforced by criminal or civil sanction and, in the latter event, whether an infringement will involve illegality, voidness or mere unenforceability; Article IV, s. 4, which enjoins members "to permit" exchange transactions only at the prescribed rates of exchange employs language capable of may interpretations; Article VIII, s. 2, according to which exchange contracts contrary to the control regulations of any member are to be "unenforceable" in the territories of all members, suggests to an Anglo-American lawyer that the contracts are valid, but cannot be sued upon. Again, who shall have the power of interpretation and decision? If control authorities are to be set up, it may not be too difficult to co-ordinate their practice, particularly if the Fund should maintain an efficient organization, staffed by experts both of comparative law and international finance, which will supply information and guidance. But the jurisdiction of the courts cannot be excluded altogether, and a divergence of views is bound to emerge. If a member state should be responsible for any decision of its control authority or its courts, the complications may be serious, and in any event a continuous revision of municipal laws and regulations will be inevitable. Finally, there remains the problem of defining those numerous terms of the treaty which may be crystal-clear to an economist but are highly perplexing to a lawyer. The chief example is the distinction between capital transfers and current transactions which is of paramount importance to the working of the scheme, the former being discouraged, the latter being welcomed. Neither conception has a recognized meaning in law. The company lawyer who remembers the problem of distinguishing capital and profits, or the income-tax expert who has so often been troubled by the difference between capital and income, will have no enthusiasm for the new conceptions which lack precision and definition. Payments for the purchase of goods, e.g., may well be payments for current transactions (as

defined by Art. XIX) which under Article VIII, s. 2, may not be restricted; but they may equally well be made for the purpose of transferring capital. The test is not an objective but a subjective one, and intentions are not only liable to be changed, but may also be disguised. It is of course possible that time and experience will solve all these and similar difficulties, yet the task of giving an approximately uniform shape to the law and practice of forty-four nations should not be underrated.

The gravity of these problems is emphasized by the provisions relating to the enforcement of the duties of members. Any "question of interpretation" is to be decided by the Executive Directors whose decision may be referred to the Board of Governors for final judgment (Art. XVIII). On the other hand, any breach of a member's obligations enables the Executive Directors to declare the member ineligible to use the Fund's resources, and if after a resonable period the default continues, the Board of Governors, by a resolution "carried by a majority of the governors representing a majority of the total voting power" may expel the defaulting member (Art. XV, which speaks of a member being "required to withdraw"). It would be unprofitable to speculate on the manner in which the provisions dealing with the interpretation of the Agreement and breaches of obligations are to be fitted together, or to ask how far a member is vicariously liable for acts of its authorities, courts and subjects. The significant point that emerges is that the treaty is characterized by a complete absence of legal machinery; it is power rather than law that prevails. The implications of this situation need not be pursued.[1]

It is one of the main purposes of the treaty "to assist . . . in the elimination of foreign exchange restrictions which hamper the growth of world trade". But members may not make "net use of the Fund's resources to meet a large or sustained outflow of capital" and the Agreement itself therefore envisages controls regulating international capital movements. Indeed, whatever the term "net use" or the term "capital" may mean, it is obvious that, if it is a member's duty to prevent in certain circumstances an outflow of capital, there is hardly any machinery available other than exchange restrictions. Other provisions of the Agreement indicate the same conclusion. As has repeatedly been pointed out, exchange transactions will only be permitted within the prescribed limits (Art. IV, s. 4). Or Article XI provides that each member shall undertake to bring its relations with non-members or persons in non-members' territories into line with the treaty and the purposes of the Fund, but shall be free to impose restrictions on exchange transactions with non-members or their residents—a permission which may in fact involve an obligation. It is therefore almost certain that in the long run the terms of the Agreement cannot be enforced without exchange control. The attempt of restoring free exchange and the simultaneous welcome extended to exchange restrictions, at least in so far as capital movements are concerned, was already a feature of the Keynes Plan (Cmd. 6437). Most lawyers will feel, and experience has shown, that there is no half-way house in these matters.

II

In many directions the Agreement on the creation of the International Bank for Reconstruction and Development is much easier to follow than that relating to the International Monetary Fund. The reason is that the latter constitutes an altogether new departure involving unforeseeable consequences, while the former envisages the formation of a banking institute following to a large extent traditional lines and exercising functions of a well-known type. Yet both the organiza-

[1] Mr. Kuhn, *loc. cit.*, p. 22, is critical of the provisions for arbitration and doubts whether they are sufficiently broad for institutions of the kind contemplated.

tion and the activities of the Bank as at present planned will have many aspects for which there is no precedent.

(1) The Bank will be an international public corporation with full juridical personality and, in particular, the capacity to contract, acquire and dispose of property and institute proceedings (Art. VII, s. 2); it will also be able to deal in securities it has issued or guaranteed, to guarantee securities in which it has invested, to borrow currency, and to buy and sell "such other securities" as a qualified majority may determine (Art. IV, s. 8). It will enjoy immunity in all respects, except that actions may be brought against it by persons other than members or their successors-in-title "in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities" (Art. VII, s. 3), and that, probably, execution can be levied after final judgment.

Like the Fund, the Bank will have a Board of Governors, Executive Directors and a manager, in this case called President (Art. V). It will also have an Advisory Council consisting of seven persons to advise the Bank on matters of general policy, and loan committees to report on the merits of proposals for loans to be made by the Bank. The legal position and the functions of the Board of Governors and the officers of the Bank are the same as in the case of the Fund and need not, therefore, be repeated.

Only such states may be members as will be members of the International Monetary Fund. The Bank will have an authorized capital of $10,000,000,000, divided into 100,000 shares of $100,000 each and increasable by a three-fourths majority of the total voting power (Art. II, ss. 1, 2). Each member shall subscribe a minimum number of shares as specified in the schedule; the minimum of shares which shall be issued at par (Art. II, s. 4) and paid for in the manner prescribed by Article II, ss. 5, 7, and 8, is 91,000. Each member will have 250 votes plus one additional vote for each share of $100,000 held by it; if no more than the minimum number of shares is subscribed, this will mean that out of a total voting power of 102,000 the United Kingdom will have 13,250, the British Empire 25,250, the United States 32,000, Russia 12,250 votes (Art. II, s. 3).

The members' liability on the shares will be limited to the unpaid portion of the issue price (Art. II, s. 2), but whenever the par value of a member's currency is reduced or "the foreign exchange value of a member's currency has in the opinion of the Bank depreciated to a significant extent within that member's territories", the member shall pay an additional amount of its own currency to make good any deficiency in value; on the other hand, if the par value of the member's currency is increased, a refund will be permitted (Art. II, s. 9).

The treaty does not state whether, to the extent of the unpaid portion of the issue price of their shares, members are under any direct liability to the creditors of the Bank. The question is probably to be answered in the negative, but it is by no means free from doubt.

Members may not pledge or encumber their shares and cannot transfer them except to the Bank (Art. II, s. 10). Since the acquisition of its own shares by a corporation involves a reduction of capital, it would have been desirable to define the circumstances in which an open or disguised reduction of capital is permitted. The only provisions bearing upon this point are those relating to the termination of membership. This may occur (Art. VI) by a member withdrawing by notice in writing, being expelled because of a breach of its obligations, or by ceasing to be a member of the International Monetary Fund. In any of these events the Bank shall repurchase the former member's shares at their value shown by the Bank's books. Payment shall be made at the end of six months from the cessation

of membership in the member's currency or, at the Bank's option, in gold; but payment "shall be withheld so long as the government, its central bank or any of its agencies remains liable, as borrower or guarantor, to the Bank, and such amount may, at the option of the Bank, be applied on any such liability as it matures". Moreover, if subsequently losses come to light for which no provision has been made in calculating the repurchase price, the member shall repay to the Bank a due proportion of the repurchase price. If one remembers the safeguards which, in the interest of creditors, the municipal legal systems have very properly set up before the capital of a limited company may be reduced by even the smallest amount, it is surprising that a corporation of the character and magnitude of the Bank may apparently be depleted of its funds with so little regard to its creditors of whom the Bank, as opposed to the Fund, may have many. Perhaps it was intended to meet this all too obvious contingency by Article VI, s. 4 (a), which provides:

> "When a government [*sic*] ceases to be a member, it shall remain liable for its direct obligations to the Bank and for its contingent liabilities to the Bank so long as any part of the loans or guarantees contracted before it ceased to be a member are outstanding; but it shall cease to incur liabilities with respect to loans and guarantees entered into thereafter by the Bank and to share either in the income or the expenses of the Bank".

The interpretation of this provision is doubtful. Probably the first part of the sentence means that by ceasing to be a member a state does not rid itself of its "direct obligations" in the sense of loans obtained from the Bank. On the other hand, the second part of the sentence would suggest that while membership subsists a state is under a direct liability to creditors in respect of the loans granted *to* the Bank and that it is this liability which ceases when membership comes to an end. In view of the provisions relating to the repurchase of shares it is difficult to believe that the above clause is intended to ensure the continuation of a member's liability for the amount of its shares after the termination of membership. This vital point clearly requires reconsideration.

(2) The operations of the Bank may take three different forms, viz., the Bank may make or participate in direct loans out of its own funds, it may make or participate in direct loans out of funds raised in the market of a member or otherwise borrowed by the Bank, or it may guarantee in whole or in part loans made by private investors through the usual investment channels (Art. IV, s. 1). In no event, however, is the Bank allowed to afford financial assistance for the benefit of persons other than members (Art. II, s. 1). Such assistance may be given to any member or any political sub-division thereof or any business, industrial or agricultural enterprise in the territories of a member, but if the member is not itself the borrower, the member or the central Bank or some comparable agency of the member acceptable to the Bank will have to guarantee the loan (Art. III, s. 4 (1)).

The Agreement contains detailed provisions dealing with such questions of machinery as the currencies to be lent, the funds available for loans, the transfer of currencies, guarantee commissions payable to the Bank and so forth (Art. IV, ss. 2, 3, and 5). These are in the nature of administrative instructions and do not require close scrutiny for present purposes. It is, however, of considerable interest to examine the measures adopted in the Agreement to ensure the due performance of liabilities. The fundamental importance of this problem is evident.

In so far as the borrowers' liability towards the Bank is concerned, there is only one clause in the treaty which deals with the terms of the loan contracts. Article IV, s. 4 (b), makes it compulsory for the Bank to stipulate in all loan contracts the currency or currencies in which payments under the contract shall

be made to the Bank. In regard to loans made out of the Bank's own funds the same clause excludes the principle of nominalism by providing that service payments made to the Bank "shall be equivalent to the value of such contractual payments at the time the loans were made, in terms of a currency specified for the purpose by the Bank by a three-fourths majority of the total voting power". Nothing is said about the law which is to govern loan contracts, about securities or the decision of disputes (Art. IX, which corresponds to Art. XVIII of the Agreement relating to the International Monetary Fund, only deals with the decision of "any question of interpretation of the provisions of this Agreement" as opposed to questions arising out of loan contracts). As to the enforcement of liabilities, all that the Agreement says is that a majority of the Governors exercising a majority of the total voting power may expel a member who "fails to fulfil any of its obligations to the Bank" (Art. VI, s. 2); but if the loan is not made to the member state itself, it may be doubtful whether the default of the borrower and of the guaranteeing central bank (which is usually a separate entity) involves a breach of the member's obligations to the Bank. The only material provision that remains relates to the mitigation rather than the enforcement of liabilities: If a member suffers from an acute exchange stringency the Bank may make arrangements with the member to accept service payments in the member's currency for not more than three years or it may modify the terms of amortization or extend the life of the loan or both (Art. IV, s. 4 (c)).

As to the Bank's liabilities towards its creditors (who, let it be remembered, may be banks or private investors all over the world), a still greater dearth of provision is to be noticed. Article IV, s. 7, has the promising heading "Methods of meeting liabilities of the Bank in case of default", but all it contains is that in case of defaults on loans made *by* the Bank it shall make arrangements for adjustment, including arrangements on the lines of those indicated in Article IV, s. 4 (c), that payments made by the Bank in satisfaction of its liabilities shall be charged in its books as explained in sub-section (b), and that it may call certain proportions of its unpaid subscriptions whenever necessary to meet its liabilities. The treaty, therefore, does not have regard to the interest of the Bank's creditors otherwise than by allowing them to proceed against it in certain municipal courts (Art. VII, s. 3). In view of the painful history of international lending and the record of such government-controlled organizations as the Bank for International Settlements (the liquidation of which "at the earliest possible moment" was recommended at Bretton Woods), it would have been desirable to expand a little on creditors' rights.

Article XVII of the Agreement relating to the International Monetary Fund and Article VIII of the Agreement relating to the Bank permit, in certain circumstances, modifications of both Agreements. Particularly in so far as the Bank is concerned, the practical success of the scheme may, to some extent, depend on the manner in which this power will be used.

F. A. Mann.

OPEN TOWNS

On several occasions during the present war belligerents have declared towns to be "open towns," and on that ground have claimed their exemption from lawful bombardment from the air. In June 1940 Paris was declared an open city by the military governor, General Herring; the Germans were already in the outskirts of the city, and entered the following day.[1] When the invasion of Yugoslavia

[1] *The Times* newspaper, 15 June 1940. The official communiqué said: "In refraining from direct defence of the capital, which is now an open town, the French Command aimed at sparing it the devastation which defence would have involved. The Command considered that no valuable strategic result justified the sacrifice of Paris".

was imminent the Yugoslav Government declared Belgrade, Zagreb, and Ljubliana open cities,[1] but Belgrade was heavily bombed by the Germans shortly after the declaration.[2] [3] On Christmas Day 1941 the American Command declared Manila an open city, stating that the defences and the civil government had been withdrawn;[4] the almost immediate result was that the Japanese, who had hitherto confined their attentions to military objectives such as the harbour and the Civite arsenal, made a savage and indiscriminate attack on civilian quarters in the old walled city.[5] On 14 August 1943, after the second great American bombing raid on the marshalling yards in Rome, the Italian Government declared Rome an open city,[6] but this declaration did not in any way modify the policy of the Allies, which was to confine bombing attacks on Rome strictly to selected military objectives, in particular to the railway yards. In all these cases the declarations were made by the belligerent occupying the territory in which the city was situated. The converse case was provided by the German proposal of June 1944 that Rome should be recognized as an open city; for the announcement from Hitler's headquarters coincided with the order to the German forces to withdraw to the north-west of the city.[7] The German proposal seems to have been ignored by the Allies. Indeed, the significant fact about all these declarations is that they made singularly little impression on the attacking belligerent.[8] What is the effect of such declarations in international law?

The statements of the law governing the bombardment of cities and towns are well known. The Brussels Conference of 1874 laid down the rule that "open towns" which were "not defended" must not be attacked or bombarded. Article 25 of the Hague Regulations of 1907 abandoned the phrase "open town"[9] but forbade

> "the attack or bombardment by any means whatever, of towns, villages, habitations, or buildings, which are not defended."[10]

The phrase "by any means whatever" was inserted expressly to cover bombing from the air.[11] Article 1 of the Hague Convention IX laid down a similar rule[12]

[1] *The Times* newspaper, 4 April 1941.

[2] *The Times* newspaper, 7 April 1941.

[3] During the invasion of Yugoslavia, Bulgaria seems also to have complained of the bombing of its "open" towns. The Bulgarian news agency, quoted by the Berlin radio, apparently announced that the Bulgarian Government had instructed its legation in Belgrade to protest against the "recent bombing of open cities in Bulgaria by Yugoslav aeroplanes". *The Times* newspaper, 8 April 1941.

[4] *The Times* newspaper, 27 Dec. 1941.

[5] *The Times* newspaper, 29 Dec., 1941.

[6] *The Times* newspaper, 16 Aug. 1943.

[7] *The Times* newspaper, 5 June 1944.

[8] A possible further example of an attack on an open city is referred to in a New York announcement of 22 Dec. 1941, which alleged that the Japanese had bombed the "open city" of Baler, the birthplace of Mr. Manuel Querzon, "in an inexcusable and unwarranted attack". *The Times* newspaper, 31 Dec. 1941. Baler does not seem to have been *declared* an open city, and the circumstances of the attack are not stated in the announcement. On Thursday, 3 May 1945, British troops entered the city of Hamburg unopposed. Orders issued to the population over the Hamburg radio began: "Hamburg is an open city. The commander-in-chief of the British troops of occupation who are to occupy Hamburg to-day issues these orders . . ." *The Times* newspaper, 4 May 1945.

[9] Although the phrase "open town" was not used in the Hague Conventions and subsequent treaties it reappeared in many of the complaints against allegedly illegal bombardment during the first World War; see Garner, *International Law and the World War*, vol. I, chap. xvii.

[10] "Not defended" (qui ne sont pas défendus) should not be confused with "unfortified". The Brussels Conference recommended that only towns which were fortified could be "besieged", but the test of fortification was dropped at the Hague Conferences. See *Wheaton's International Law*, vol. 2, 7th ed., by Keith (1944), p. 215.

[11] See, e.g., Holland, *Letters to The Times upon War and Neutrality*, 3rd ed. (1921), p. 67.

[12] Hague Convention IX of 1907, Art. 1: "The bombardment by naval forces of undefended ports, towns, villages, dwellings, or buildings is forbidden".

for naval warfare, with the important addition in Article 2 of a rule permitting[1] the bombardment by naval forces of certain specified "military objectives". Article 2 was designed to meet the special circumstances of naval warfare; for whereas the commander of an army can take possession of an undefended place and so deny to the enemy the use of its military resources, a naval commander usually can only deny such resources to the enemy by destroying them with shell fire. These special considerations apply with even greater force to the circumstances of aerial warfare. Consequently, when the Air Warfare Rules were drawn up in 1923, the criterion of the undefended town was abandoned altogether and that of the military objective was substituted.[2] It is important to note the stages through which the law has passed in adapting itself to new methods of warfare. The old land warfare rules specified the places which might not be bombarded: the new air warfare rules specify the places which may be bombarded. The test of defence is superseded by the test of the military objective. The naval warfare rules of 1907 represented an intermediate stage where both tests were used side by side.

There can be little doubt that the land warfare rules exempted the "open and undefended" town from bombardment because, being undefended, it was, under the conditions of contemporary warfare, open for the enemy to enter and take possession of, or destroy, its military resources.[3] This quality of being open to entry by the enemy is the essence of the rule. There is no virtue in mere lack of defence. Unless accompanied by its corollary of freedom of entry the exemption

[1] Hague Convention IX of 1907, Art. 2: "Military works, military or naval establishments, depots of arms or war material, workshops or plant which could be utilized for the needs of the hostile fleet or army, and ships of war in the harbour, are not, however, included in this prohibition. The commander of a naval force may destroy them with artillery, after a summons followed by a reasonable interval of time, if all other means are impossible, and when the local authorities have not themselves destroyed them within the time fixed".

[2] The relevant articles are:

Art. 22: "Aerial bombardment for the purpose of terrorizing the civilian population, of destroying or damaging private property not of military character, or of injuring non-combatants, is prohibited.

Art. 24: "(1) Aerial bombardment is legitimate only when directed at a military objective —that is to say, an object of which the destruction or injury would constitute a distinct military advantage to the belligerent.

"(2) Such bombardment is legitimate only when directed exclusively at the following objectives: military forces; military works; military establishments or depots; factories constituting important and well-known centres engaged in the manufacture of arms, ammunition or distinctively military supplies; lines of communication or transportation used for military purposes.

"(3) The bombardment of cities, towns, villages, dwellings, or buildings not in the immediate neighbourhood of the operations of land forces is prohibited. In cases where the objectives specified in paragraph (2) are so situated that they cannot be bombarded without the indiscriminate bombardment of the civilian population, the aircraft must abstain from bombardment.

"(4) In the immediate neighbourhood of the operations of land forces, the bombardment of cities, towns, villages, dwellings, or buildings is legitimate provided that there exists a reasonable presumption that the military concentration is sufficiently important to justify such bombardment, having regard to the danger thus caused to the civilian population."

The Air Warfare Rules of 1923 were never ratified. They are, however, the most authoritative pronouncement on the subject, and States have from time to time announced that they would be guided by them. See remarks in Oppenheim, *International Law*, vol. II, 6th ed. (Lauterpacht), p. 409.

[3] See, e.g., Westlake, *International Law*, Part II, p. 315: "the price of immunity from bombardment is that the place shall be left open for the enemy to enter". Also, Holland, *Letters to The Times upon War and Neutrality*, 3rd ed. (1921), p. 68: "Under what circumstances does a place, *prima facie*, 'undefended', cease to possess that character? Doubtless so soon as access to it is forcibly denied to the land forces of the enemy." Also, *Wheaton's International Law*, vol. 2, 7th ed. (Keith) (1944), p. 215: "To offer a defence is not being open for the enemy to enter if he wishes or if he is able otherwise".

of the undefended town would lead to the absurd result that a belligerent could secure the immunity of his production centres and lines of communication from lawful bombardment simply by omitting to defend them, and could thus concentrate all his arms for attack.

Even under the conditions of modern warfare the truly undefended town is *ipso facto* open to entry by the enemy. The notion that a town far behind the front line of fighting troops may be an undefended town for the purposes of aerial warfare is based on confused thinking about the nature of defence, and ignores the lesson of the Second World War that it is quite impossible to distinguish clearly between the operations of armies and the operations of air forces. The declarations of open cities in that war show that there is still a tendency to subscribe to the ingenuous doctrine that a town without anti-aircraft guns is "undefended". But it is ludicrous to suppose that a town shielded by an army holding a line in front of it is undefended. Moreover, even the defences peculiarly appropriate to aerial warfare are no longer purely or even mainly local defences. Defending fighter planes may be based miles from the town. A screen of anti-aircraft guns sited on the route to the town, even though many miles away from it, may be a more effective defence than anti-aircraft guns sited in or around the town itself. Thus, to describe Rome as an undefended town in 1943, before the Allies had even gained a foothold on the Italian mainland, makes military nonsense. It is submitted, therefore, that the equation between the "undefended" town and the "open" town still stands. It is impossible to conceive of a truly undefended town which is not also open in every sense of the word.

It will be seen that if the classical doctrine of the undefended town is alone applied to aerial warfare, towns behind the front line (and therefore defended) are subject to bombardment from the air restricted only by such considerations as can be deduced from vague and general principles of humanity. The air arm has in fact overreached the limitations based on the old rule. Hence it was that the Air Warfare Rules of 1923 attempted to restrict such bombardment by the novel test of the "military objective". This new limitation applies to all towns, whether they are defended or not. Although the military objective criterion is different from the criterion of the undefended town, the ultimate military considerations are the same in both cases. Both rules are designed to permit a belligerent to deny to his enemy the military resources of a town: under the old rule he may do it by entering and taking possession of such military resources; under the new rule he may deny them to the enemy by bombing them from the air. In short, the test of defence and the test of the military objective are complementary criteria by which is applied a fundamental rule of war that a belligerent must be allowed to deny to his enemy the use of the enemy's military resources.

One obvious result of the Air Warfare Rules of 1923 is that a town that does not contain military objectives may not be bombed,[1] and this will apply irrespective of whether the town is defended or not. [2] Thus the Air Warfare Rules have created a new category of town exempted from lawful bombardment. The legal position of such towns being assimilated to that of undefended towns, they are often referred to as open towns. This, as we have seen, is strictly a misnomer, but we may compromise with the popular terminology and call such towns quasi-open towns.

The Air Warfare Rules, however, raise a further and more difficult question: Can a belligerent secure the exemption of a town from lawful bombardment by voluntarily denying to himself the use of its installations and resources for warlike

[1] Art. 24 (i): "Aerial bombardment is legitimate only when directed at a military objective".

[2] Defences could not, of course, be sited in the town itself, for these would in themselves be military objectives of the first order.

purposes? If, for example, a belligerent routes his lines of communication so as to avoid the town, closes down its armament works, and withdraws all his troops, can he claim for that town the status of a quasi-open town? As we shall see, with the sole exception of Paris, the declarations during the present war can only be explained on the basis that the juridical status of a town can be changed in such a way. But the question remains unanswered, for the war has not yet produced a case in which the claim was conceded by the enemy, or even one when the conditions under which such a declaration would be observed were satisfactorily defined. In theory there is no great difficulty about it, for if the military resources of a town are in some way excluded from the sphere of warlike operations, they cease to be objects "of which the destruction or injury would constitute a distinct military advantage to the enemy belligerent". There are, however, certain practical difficulties. The first practical difficulty is that the content of the term "military objective" is not easily defined, and the attempted definitions in 1923 will probably require modification in the light of the experience of the Second World War; that question, however, is too large to be dealt with in this Note. A further practical difficulty is that the enemy belligerent will be entitled to insist on some machinery for guaranteeing that the town's resources are not in fact being used for military purposes. Clearly, a mere declaration is not sufficient in itself; indeed, this was implicitly acknowledged by the Italian Government in declaring Rome an open city, for their statement urged that they were "waiting to know the circumstances in which this declaration would be accepted". The difficulty, however, is not insuperable. For example, neutral observers might be called upon to patrol the town. Moreover, the enemy can to-day satisfy himself to a very large extent by photographic reconnaissance.

We are now in a position to examine in more detail the examples of the Second World War.[1] The case of Paris in 1940 is simple. It is an example of a truly "open and undefended" town of the orthodox type. The French armies withdrew south of the city, leaving the Germans free to enter without resistance.

The American pronouncements regarding Manila, on the other hand, are surprisingly confused. Great emphasis was laid on the "undefended" situation of Manila, both in the declaration itself and in the complaints concerning the Japanese bombardment. Yet, as the American forces were still holding a line round the city, it could hardly qualify as an open town of the orthodox type.[2] Steps were also taken which were appropriate to a quasi-open town: thus, the civil government of the Commonwealth was withdrawn from the city "so that there might not be the slightest doubt that it had ceased to be a military objective".[3] In the interval between the declaration and the indiscriminate attacks the Japanese did not cease to bomb military objectives in and near the city. This was apparently regarded as unexceptionable by the Americans: a curious dispatch from New York of 26 December 1941 (the main Japanese attack was on the 27th), after referring to the declaration of the open city, said: "Apparently the Japanese have respected the change in status" for while there had been several bombings in or near Manila "the United States Army spokesman said that the bombing was directed only at military objectives". In the light of this statement it is difficult to see in what way an open town is in any better position than any other town, for the rules

[1] It has not been possible to find information on the declarations regarding Belgrade, Ljubliana, and Zagreb, other than the bare facts.

[2] It is surprising that the Japanese did not take this point. In fact they replied with a quibble that "Japan does not recognize Manila as an open city because the decision was taken by General MacArthur without consultation with the Filippinos" (*The Times* newspaper, 29 Dec. 1943). On behalf of the Filippino government, M. Vargas replied that "the Filippino people were in full accord with General Macarthur in his action in declaring Manila an open city" (*The Times* newspaper, 30 Dec. 1941).

[3] *The Times* newspaper, 29 Dec. 1941.

of 1923 clearly confine bombing to military objectives whether the town is open or not. It seems, indeed, to invite the inference that in a non-open town indiscriminate bombing is lawful. In short, the case of Manila shows every sign of hurried improvisation, and is of little value as a precedent. There is, of course, no doubt that the bombing of the old walled city was illegal, but this was so under the ordinary rules of law, irrespective of any special status of the town.

The declaration of Rome as an open city by the Italian Government in August 1943 was little more than a public request to the Allies to state the conditions under which they would discontinue their bombing attacks on the city. The Allies were unable to comply with the request for the very good reason that however anxious the Italian Government might have been to comply with any conditions, they were in fact powerless to prevent the German Army from using the city as a military centre. Although the Allies never stated their conditions for the recognition of the open city, an answer to a question in the House of Commons in May 1944 gives some indication of the reasons why the Allies were *not* prepared to exempt Rome from bombardment. The Under-Secretary to the Foreign Office said: "No commitments have been made to accede to the request that Rome shall be treated as an open city. The German Army is still using its environs for military purposes."[1] No mention is made of defence. The statement seems to admit by implication that if a town, even though defended, is not used for military purposes, it might be treated as an open town.

The German Command maintained its attitude of indifference to the fate of Rome until 6 June 1944, when it became apparent that the Allied advance could not be stopped short of the city. It was only then that Field Marshal Kesselring's headquarters communicated to the Allies, through the medium of the Vatican, a proposal for an agreement "confirming" the status of Rome as an open city. It seems likely that the move was partly if not mainly propaganda for the home front, being intended to provide a respectable explanation for the withdrawal of the German troops north of the city. The German Command may also have hoped that the Allies might be manœuvred into recognizing for Rome a special status which would cramp their use of its military resources, thus enabling the Germans to deny to the Allies by legalistic argument what they were no longer in a position to deny to them by force of arms. The Allies ignored the proposal. Nevertheless, the conditions suggested by the German Command repay examination for, *faute de mieux*, the arguments of the law-breaker may provide some evidence of what the law is. The conditions suggested were:

> "The German High Command undertake to keep no military installations or troops within the confines of the open city. Furthermore, the German High Command undertake to carry out no troop movements in Rome."[2]

Again, there is no mention of defences. The proposal is entirely in terms of the military objective. The German High Command was in fact proposing what we have called a quasi-open city.

The conclusions of this brief examination may be summarized as follows: An open town properly so called is one which is so completely undefended that the enemy may enter and take possession. Such a town is exempted from lawful bombardment, for in these circumstances bombardment would be contrary to the fundamental principle forbidding destruction superfluous to military requirements. This rule does not apply to a town behind the front line, for it cannot properly be said to be either open or undefended, and the enemy, being unable to take possession of its military resources, must be allowed to attempt their destruction by bombardment from the air. Such bombardment is, however (apart

[1] *The Times* newspaper, 3 May 1944. [2] *The Times* newspaper, 5 June 1944.

from the question of reprisals), strictly limited to military objectives. Therefore, a town without military objectives would be exempt. It would seem to follow also that a belligerent may claim exemption for a town if he voluntarily ceases to use its resources for military purposes, but the precedents of the Second World War are inconclusive on this point. Such a town could not in any case properly be called an open town, but the legal incidents being similar to those of the open town, it may not inappropriately be called a quasi-open town.

R. Y. J.

JURISDICTION OF ENGLISH COURTS IN DIVORCE AND NULLITY

The unsatisfactory state of the English rules as to jurisdiction in dissolution or nullity of marriage was forced on public attention by the debate in Parliament on the Bill—now an Act—which the Government introduced in 1944 to deal with certain war marriages. The Government did not find it possible to tackle the general issue, but passed exceptional legislation, The Matrimonial Causes (War Marriages) Act, 1944, to provide a ready means for dissolving unions entered into during the period from the outbreak of war to a date to be fixed by an Order in Council (which will be presumably that adopted for the end of the war). The Act is limited to marriages where the husband was domiciled outside Great Britain. But they are not a small class. The number of marriages of British women with men in the Dominion and Colonial forces stationed in England was already in October 1944 more than 20,000. The number with American men is probably not less; and in addition many British women have married other foreigners—Poles, Czechs, Belgians, &c.—temporarily in the country in the military or the civil services. Great hardship would be caused by strict adherence to the established rules about marriage relations in England under which (1) domicile, as distinct from residence, is the sole basis of jurisdiction in divorce, whether for British or foreign subjects; and (2) a woman on marriage acquires the domicile of her husband, even though in fact she never lives with him in his country of domicile.

The new law provides that, in regard to marriages celebrated here during the war with a husband domiciled abroad, English courts should have jurisdiction in divorce and nullity as if both parties were domiciled in England. Any action must be brought within five years of the date prescribed; and if the parties to the marriage have resided at all in the country of the husband's domicile, the exceptional relief is denied. A further extraordinary provision, deviating from the regular law, is that proceedings for divorce may be taken by either party to the marriage at any time after the marriage; and the rule in the Matrimonial Causes Act, 1937, which prohibits such proceedings during three years after marriage, is excluded.

The Act of 1944 follows in principle an Act passed shortly after the end of the First World War, the Matrimonial Causes (Dominion Troops) Act, 1919; but it is much more comprehensive. That earlier legislation gave the English courts competence to deal with dissolution of marriages contracted in Britain during the war between British women and members of H.M. Forces domiciled outside the United Kingdom in any Dominion, possession or protectorate, as though the parties were domiciled or resident in that part of the United Kingdom. The relief was restricted to actions brought within one year after the passing of the Act; and, as in the later legislation, it was denied where the parties had at any time resided together in the country of the husband's domicile. There were elaborate provisions for reciprocity in the Dominions and Colonies.

The difference in the scope of the exceptional measures then and now reflects

the change in the circumstances between the Second and the First World Wars. Since 1939, Great Britain has been a great international asylum and arsenal. Men and women not only from the Dominions and Colonies, but from the United States—in immense numbers—and from the oppressed countries of Europe have been gathered and have lived for some time in the midst of our people, sharing their life and their homes. The rigidity of the English rules about dissolution of marriage, which those circumstances challenged, has been emphasized in the debates in Parliament. Members stressed principally the hardships caused, and the unfairness and anomaly of granting relief from them, to those who happened to be married within the limited period of the war, while leaving other British women, married before the war to foreign husbands and resident here but deserted by their husbands, without effective remedy. As it was put, "the divorce law of England has not stood up to the pressure of the war". It was complained that the special legislation was not based on any principle; but to that the Attorney-General suggested the principle that, when a woman marries a foreigner and the marriage breaks down before she has left the English home, the English court should have jurisdiction to dissolve the union.

It is opportune to consider the present state of the law in England, its relation to systems in other countries, and the suggestions which have been made for a more general and radical amendment. Till the middle of the nineteenth century questions of nullity of marriage and of divorce *a mensa et thoro* (which we now know as judicial separation) were tried in England by ecclesiastical tribunals. Divorce *a vinculo* could be obtained only by a private Act of Parliament. The ecclesiastical tribunal based its competence not on domicile but on the residence of the parties, and no question of private international law could be involved. In 1858 its marriage jurisdiction was transferred to the High Court, and the question of competence remained as before. Two years earlier divorce, or a complete dissolution of the marriage contract, was introduced as a remedy which the courts could grant. And for some forty years they were prepared to grant it on the basis of matrimonial residence of the parties, which was the criterion for judicial separation, restitution of conjugal rights, and nullity. On the other hand, they would only recognize a foreign divorce if it were granted by the court of the husband's domicile. The leading case, however, of *Le Mesurier* [1895] A.C. 517, judged by the Privy Council, laid down the doctrine that domicile alone could be the test of competence for the dissolution of marriage. And the domicile that mattered was that of the husband. Once adopted, that basis was strictly enforced. The court believed that it was applying the *Jus Gentium*, although in most European countries jurisdiction was exercised on the basis either of domicile or of nationality, and the foreign conception of domicile was much less stringent than the British. Westlake observed that in no point did the rules of private international law adopted in England fall short of receiving universal assent so much as in regard to divorce. For a time the jurisdiction of English courts in other matters of matrimonial relations on the basis of residence was not affected.

The peculiar hardship suffered by a British woman who married a foreigner in this country, and was then deserted by him while they were resident here, came before the courts on several occasions. In two decisions in first instance given in 1913, *Stathatos* and *De Montaigu* [1913] P. 46 and 154, the judges allowed an exception to the general rule and granted the suit of the woman for divorce. But some years later the Privy Council held rigidly that a woman separated from her husband could not thereby acquire a domicile different from his, and therefore could only sue for divorce in the country in which the husband was domiciled (*Attorney-General of Alberta* v. *Cook* [1926] A.C. 444).

The severity of the English rule was not approved in the British Dominions or in the United States. The courts in the latter country held that a deserted wife

can sue her husband for divorce before the court where she is resident, even though it is different from the matrimonial domicile (*Gould* v. *Gould*: *Yale Law Journal*, vol. 32 (1923), p. 842). In the Dominions the difficulty was overcome by legislation. The Canada Divorce Jurisdiction Act, 1930, prescribes that a woman deserted for two years at least by her husband may sue for divorce in the province where he was domiciled before the desertion. A New Zealand Act of 1931 prescribes that a woman married and resident in that dominion is regarded after desertion for three years as having a sufficient domicile, and may sue there for divorce.

The British Parliament itself was moved to enact legislation for the relief of British parties living in India and the Colonies. By the Indian and Colonial Divorce Jurisdiction Act, 1926, the courts in the Empire were authorized to grant dissolution of marriage, though the parties were domiciled in Great Britain, on the same terms as they could grant divorce to parties with a domicile in the territory. The conditions were that the plaintiff had his or her residence there at the time the suit was brought, the parties had their last common residence there, and the marriage or the act which gave rise to the suit took place there.

In the year 1931 one of the Judges of the Scottish Court of Sessions stated that the proper test of jurisdiction in divorce should be not the domicile of the husband but the matrimonial domicile, which was adopted in Scotland before the Privy Council decision (*Grant* v. *Grant* (1931) Sessions Cases 238). It is notable, too, that the Institute of International Law in that same year passed a resolution in favour of making the actual residence of the deserted wife equivalent to domicile for the purpose of a divorce suit.

Parliament did at last introduce a limited modification into the English rule, through the Matrimonial Causes Act, 1937, enlarging the grounds for divorce. Section 13 of the Act prescribes that, "when a wife is deserted by her husband, or when an alien husband is deported from the United Kingdom . . . and he was immediately before the desertion or deportation domiciled in England", the court should have jurisdiction notwithstanding that the husband has changed his domicile since the desertion or deportation. That provision followed a rule, common in Continental countries, making the test of common domicile of the spouses decisive.

The situation with regard to nullity was affected by the principle of the husband's domicile as the only forum for divorce. While residence of one or both parties in England, and even the celebration of the marriage in England, were recognized as a basis of jurisdiction in a suit of nullity where it was claimed that there was no marriage (e.g., on the ground of incapacity), the courts held, after a time, that where a decree of nullity was sought on the ground of impotence, which made the marriage voidable, residence was insufficient, and only the court of the man's domicile was competent. That rule was laid down in the case of *Inverclyde* [1931] P. 29, which was influenced by remarks in a decision of the House of Lords (*Von Lorang* v. *Administrator of Austrian Property* [1927] A.C. 641). A question involved incidentally in the latter case was the competence of a foreign court to grant nullity where the foreign husband had married a British woman; and it was affirmed that the court of the husband's domicile alone had jurisdiction.

These cases were doubted in several subsequent judgments; and during 1944 two decisions given in first instance rejected the distinction in regard to jurisdiction between suits for nullity where the marriage is void and where it is voidable (*Easterbrook* v. *Easterbrook*, *Law Times*, vol. 170 (1944), p. 26, and *Hutter* v. *Hutter*, [1944] 2 *All E.R.*, p. 368). Both cases concerned the marriage of American soldiers with Englishwomen which had not been consummated. The parties were married and resident in England, but the domicile of the husband was in America. In the latter suit the judge, after having the matter argued by the King's Proctor, held that jurisdiction in nullity should be governed by the principle of the ecclesi-

astical courts making residence alone the test, and that the distinction made in the *Inverclyde* judgment was misconceived. The exclusive jurisdiction of the court of the domicile was to be applied only for the new remedy of divorce, unknown to the Ecclesiastical Courts. At the same time the courts have affirmed the rule that the court of the husband's foreign domicile is competent to annul a marriage celebrated in England with a British woman (*Galene* v. *Galene*, [1939] 2 *All E.R.*, 148).

The position then to-day is that the remedies other than divorce can be obtained by an English or foreign woman—or by the husband—resident in this country; but save for the exceptional cases covered by the Act of 1937, and the recent war measure, no divorce can be obtained in England unless the husband is domiciled here. Apart from the case of English women deserted by their foreign husbands, hardship occurs where a foreign resident woman wishes the marriage to be dissolved and the husband has departed to another country, and where the married parties are refugees and have not clearly enough established a domicile in this country to found jurisdiction.

The English law as to jurisdiction in divorce, it is submitted, calls for a thorough examination. Either the matrimonial domicile or the residence of the two parties might be accepted as a sufficient basis of competence for divorce, which is not in essence different from other forms of termination of the marriage tie. It is notable that the International Law Association, at its conference in 1932, recommended the adoption of an international convention broadening the grounds of jurisdiction in divorce. And the old Hague Convention concerning Divorce, made before the First World War and adopted by a number of Continental states—but not by Great Britain—was much more liberal than the English rule as to jurisdiction. That Convention ceased to operate after 1918. But it would be fitting that in the new international order, which must envisage a greater commerce between the subjects of various States, that will involve matters of civil status as well as economic and social matters, the effort should be renewed by international convention to obtain agreement on common principles of jurisdiction for the sake of the common man and woman. Great Britain should be prepared to modify to that end her exclusive loyalty to the principle of domicile, particularly if she adheres to the other principle, that the legal domicile of the wife remains that of the husband, whatever the facts of their residence.

NORMAN BENTWICH.

THE LEGAL PERSONALITY OF INTERNATIONAL ORGANIZATIONS

THERE has in the past been a considerable amount of controversy on the question whether public international organizations can be regarded as possessing legal personality.[1] In the absence of any clear definition of the position recourse has

[1] See, for instance, Guido Fusinato, "De la personnalité juridique de l'Institut international d'agriculture", in *Rivista di Diritto Internazionale*, Anno VIII, 1914, pp. 149–55; D. Anzilotti, "Gli organi communi nelle Societa di Stati", *ibid*, 156–64; Mamelok, A., *Die juristiche Person im internationalen Privatrecht*, Zurich, 1900; Gustave Moynier, *Les bureaux internationaux des unions universelles*, Geneva, 1892; Fedozzi, *Gli enti collettivi nel diritto internazionale*, 1897; Karl Neumeyer, "Les unions internationales" in *Revue de droit international, de sciences diplomatiques, politiques et sociales*, Vol. 2, 1924, pp. 16–40, 139–44 and 343–62, and *Internationales Verwaltungsrecht*, Vol. 4, 1936, p. 383; Manfredi Siotto Pinto, "Les sujets de droit international autres que les états" in 41 *Hague Recueil*, pp. 251–357; Carl Ruhland, "Le problème des personnes morales en droit international privé", in 45 *Hague Recueil*, pp. 457–67; Michel Dendias, "Les principaux services internationaux administratifs" in 63 *Hague Recueil*, pp. 246–358; A. Rapisardi-Mirabelli, "La théorie générale des unions internationales," in 7 *Hague Recueil*, pp. 345–90; G. Ottolenghi, "Sulla personalità internazionale della Unione di

been had, in order to avoid the practical inconvenience of an anomalous legal status, to agreements with the States where such organizations have had their headquarters recognizing that the organizations enjoy legal personality,[1] and to such doubtful expedients as securing legal personality for public international organizations by incorporation or analogous action under some system of municipal law.[2] The recurrence of past controversies and difficulties can be avoided by

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Stati" in *Rivista di Diritto Internazionale*, Anno XVII, Serie III, Vol. IX, 1925, pp. 313–57 and pp. 461–99; Alfred Verdross, "Les règles générales du droit international de la paix", in 30 *Hague Recueil*, pp. 307–8 and *Die Verfassung der Völkerrechtsgemeinschaft*, Vienna, 1926, p. 115; Arrigo Cavaglieri, "Les règles générales du droit de la paix", in 28 *Hague Recueil*, pp. 318–20 and 507–8, and "I soggetti del diritto internazionale" in *Rivista di diritto internazionale*, Anno XVII, Serie III, Vol. IV, 1925, pp. 18–32 and 169–87; J. Gascon y Marin, "Les transformations du droit administratif international" in 34 *Hague Recueil*, pp. 50–52; Maurice Bourquin, "Les règles générales du droit de la paix", in 35 *Hague Recueil*, pp. 85–91; Gabriele Salvioli, "Les règles générales du droit de la paix", 46 *Hague Recueil*, pp. 80–88; Karl Strupp, "Les règles générales du droit de la paix", 47 *Hague Recueil*, pp. 463–5 and 531–5; Paul Negulesco, "Principes du droit international administratif", in 51 *Hague Recueil*, pp. 641–7; Léon Michoud, *La théorie de la personnalité morale*, 3rd edition, 1932, Vol. I, pp. 305–6 and Vol. II, p. 345; Ernest Mahaim, "L'organisation permanente du Travail", in 4 *Hague Recueil*, pp. 195–6; Francesco Ruffini, "La protection internationale des droits sur les oeuvres littéraires et artistiques", in 12 *Hague Recueil*, pp. 479–95; Marcel Plaisant, "La protection internationale de la propriété industrielle", in 39 *Hague Recueil*, pp. 393–5; Cino Vitta, "Le droit sanitaire international", in 33 *Hague Recueil*, p. 581, and "La coopération internationale en matière d'agriculture", in 56 *Hague Recueil*, pp. 326–33; Bienvenuto Griziotti, "La banque des règlements internationaux", in 42 *Hague Recueil*, pp. 397–8; Jan Hostie, "Le statut international du Rhin", in 28 *Hague Recueil*, pp. 208–9; "La nature juridique de l'union télégraphique et son bureau international", in *Journal télégraphique*, April 1930, Vol. 54, pp. 65–8; Max Schroder, *Die Grandbuchfähigkeit des Völkerbundes*, Berlin, 1932; Percy Corbett, "What is the League of Nations?" in *British Yearbook of International Law*, 1924, pp. 119–48, and "World Order—An Agenda for Lawyers", in *American Journal of International Law*, Vol. 37, No. 2, April 1943, pp. 218–19; Arnold D. McNair, "The Functions and Differing Legal Character of Treaties", *British Yearbook of International Law*, 1930, pp. 116–18; Sir John Fischer Williams, "The Status of the League of Nations in International Law", in *Chapters on Current International Law and the League of Nations*, pp. 477–500, "The Legal Character of the Bank for International Settlements", in *American Journal for International Law*, Vol. 24, pp. 665–73, and "A Legal Footnote to the story of German Reparations", in *British Yearbook of International Law*, 1932, pp. 33–5; Manley O. Hudson, "The Bank for International Settlements", in *American Journal of International Law*, Vol. 24, No. 3, 1930, pp. 561–6; Walter Scott Penfield, "The Legal Status of the Pan American Union", in *American Journal of International Law*, Vol. 20, 1926, pp. 257–62; Graham H. Stuart, "The International Lighthouse at Cape Spartel", in *American Journal of International Law*, Vol. 24, 1930, pp. 770–6; Philip C. Jessup, "The Great Lakes—St. Lawrence Deep Waterways Treaty", in *American Journal of International Law*, Vol. 26, No. 4, October 1932, pp. 814–19; and W. Friedmann, "International Public Corporations", in *Modern Law Review*, Vol. VI, No. 4, December 1943, pp. 185–200.

[1] E.g., modus vivendi defining the Status and Immunities of the League of Nations and its officials in Switzerland, 18 Sept. 1926, Art. 1, Hudson, *International Legislation*, vol. I, p. 224; cf. Canadian Treaties of Peace (Status of the International Labour Office) Order, 1941, sections 2 and 3, *Minutes of the Nineteenth Session of the Governing Body of the International Labour Office*, pp. 45–6.

[2] E.g., the Bank for International Settlements was created and granted full personality by a constituent charter granted by the Swiss Government in accordance with the terms of an international Convention; the Regulations annexed to the Convention of 28 Oct. 1875 respecting the creation of an International Office of Weights and Measures (Art. 3), the Convention establishing the International Office of Public Health (Art. 3), the Organic Statutes of the International Office for dealing with Contagious Diseases of Animals (Art. 3) annexed to the Agreement of 25 Jan. 1924, and the Regulations of the International Office of Chemistry (Art. 7) annexed to the Convention of 29 Oct. 1927, all provided that the French Government would, at the request of the international committees controlling these offices, which were located in Paris, take the necessary steps to have them recognized as institutions of public utility, and the Organic Statute of the International Bureau of Intelligence on Locusts (Art. 3) annexed to the Agreement signed at Damascus on 20 May 1926 provided that the French High Commissioner for Syria would take the necessary measures to have the Bureau recognized as an institution of public utility; the Institutes placed at the disposal of the League of Nations

including in the constitutions of new international organizations provisions conferring on these organizations either full legal personality or some measure of legal capacity with a defined content. This has been done in several recent cases. Thus the Constitution of the Food and Agriculture Organization of the United Nations provides that "The Organization shall have the capacity of a legal person to perform any legal act appropriate to its purpose which is not beyond the powers granted to it by this Constitution,"[1] and the Articles of Agreement of the International Monetary Fund and of the International Bank for Reconstruction and Development provide that the Bank and the Fund respectively "shall possess full juridical personality, and in particular, the capacity: (*a*) to contract; (*b*) to acquire and dispose of immovable and movable property; (*c*) to institute legal proceedings".[2] The International Civil Aviation Convention provides that the International Civil Aviation Organization "shall enjoy in the territory of each contracting State such legal personality as may be necessary for the performance of its functions. Full juridical personality shall be granted wherever compatible with the constitution and laws of the State concerned".[3] The Agreement concerning the establishment of a European Central Inland Transport Organization provides that the Organization shall have the capacity to perform any legal act appropriate to its object and purposes, including the power to acquire, hold and convey property, to enter into contracts and undertake obligations, to designate or create subordinate organs and to review their activity, subject to a limitation in respect of the ownership of transport equipment and material,[4] and embodies an undertaking by member governments to "recognize the international personality and legal capacity which the Organization possesses".[5] The Charter of the United Nations leaves on one side the concept of legal personality and provides that "The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes".[6] The Report to the President on the Results of the San Francisco Conference by the Chairman of the United States Delegation contains the following comment on this Article:

> "It is apparent that an organization like the United Nations which will have offices and employees, will purchase supplies, and presumably rent or purchase office space, must have the legal capacity to enter into contracts, to take title to real and personal property and to appear in court (although its position as a defendant is protected by Article 105). The purpose of Article 104 is to make clear that the Organization has the legal capacity. No such provision was included in the Covenant but the capacity was recognized in practice as in the relations between the League of Nations and the Swiss Government. A provision similar to that stated in this article was included in the agreements rela-

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by various governments were granted legal personality by action taken by the governments concerned; in the case of the Institute of Intellectual Co-operation the legal personality so created was afterwards recognized by the International Act concerning Intellectual Co-operation of 3 December 1938 and which was signed on behalf of forty-five governments (Article 4); the Convention for the establishment of an Inter-American Bank (which is not in force) provides for the creation of the Bank as a body corporate by a charter to be granted by the United States of America. The convention on the Inter-American Institute of Agricultural Sciences of 15 Jan. 1944 is of interest in that it provides for the substitution of an international status resulting from the Convention for the earlier incorporation of the Institute under the laws of the District of Columbia.

[1] Article XV (1).

[2] Fund Agreement, Art. IX, Sec. 2; Bank Agreement, Art. VII (2). For a critical discussion of these provisions see Arthur Kuhn, "United Nations Monetary Conference and the Immunity of International Agencies", in *American Journal of International Law*, vol. 38, No. 4, Oct. 1944, pp. 662–7.

[3] Art. 47.

[4] Article IV (1).

[5] Article VIII (13).

[6] Article 104.

tive to the following United Nations organizations: Food and Agriculture Organization; UNRRA; International Monetary Fund; International Bank for Reconstruction and Development; Provisional International Civil Aviation Organization. The need for such a provision was discussed and rediscussed at the conferences dealing with those organizations and it has been the conclusion that for some states at least it is helpful to have such a provision included in the Charter to remove any doubt. It is the national law of each country which determines whether a particular body or organization which is not set up as a corporation under the law of that country will have legal capacity. National laws vary greatly on this matter; in some instances Article 104 may be unnecessary, in some cases it may need to be supplemented by legislation, and in others it may operate of its own force to confer the necessary status. The simple text adopted, using the same criterion as that applied in the case of privileges and immunities under Article 105, should be ample to take care of the actual needs of the Organization.

"This Article does not deal with what is called the 'international personality' of the Organization. The Committee which discussed this matter was anxious to avoid any implication that the United Nations will be in any sense a 'superstate'. So far as the power to enter into agreements with states is concerned, the answer is given by Article 43 which provides that the Security Council is to be a party to the agreements concerning the availability of armed forces. International practice, while limited, supports the idea of such a body being a party to agreements. No other issue of 'international personality' requires mention in the Charter. Practice will bring about the evolution of appropriate rules so far as necessary."[1]

The Constitution of the United Nations Educational, Cultural and Scientific Organization provides that the provisions of Article 104 of the Charter concerning the legal status of the United Nations Organization "shall apply in the same way to" U.N.E.S.C.O.[2]

None of these provisions can be regarded as fully satisfactory. The legal capacity of the Food and Agriculture Organization appears to be subject to three limitations: it can perform only legal acts;[3] its acts must be appropriate to its purpose; and they must not be beyond the powers granted to it by the Constitution of the Organization. These limitations would appear to have been inspired by political preoccupations rather than by any coherent legal doctrine, and interesting questions could be raised in regard to the extent to which international or national tribunals would be bound by a decision of the Organization that an act was appropriate to its purpose or within the powers granted to it by its Constitution and in regard to liability for illegal acts performed in the name of the Organization. The Civil Aviation formula is even more patently a political compromise with no defensible juristic basis. The legal capacity of public international organizations, like that of individual foreign States, derives from public international law; municipal legislation may be necessary to secure effective recognition of this capacity for municipal purposes, but the function of such legislation is declaratory and not constitutive; it is compatible with the declaratory function of such legislation that it should prescribe any conditions which may be thought appropriate for the exercise within the jurisdiction of the State concerned of legal personality attributed to the organization in question by an international constituent instrument or by customary international law; but it is as inherently fantastic as it is destruc-

[1] Department of State Publication 349 Conference Series 71.

[2] Article XII.

[3] It may be, however, that the term "legal acts" means acts in the law rather than acts which are not illegal.

tive of any international legal order to regard the existence and extent of legal personality provided for in the constituent instrument of an international organization as being derived from, dependent upon, and limited by, the constitution and laws of its individual member States. The Civil Aviation formula calls to mind the United States practice of multiple incorporation under the laws of a number of States.[1] This practice has developed because of complications in regard to jurisdiction over corporations, the regulation of their internal affairs, and their liability to taxation for which there is no analogy in the case of public international organizations. It is neither necessary nor desirable that international practice should be inspired or influenced by the complexities of multiple incorporation as they have evolved in the United States. The Bretton Woods formula is much less defective, but it is difficult to understand why it is necessary to particularize three of the capacities included in "full juridical personality" in view of the attribution to the Fund and the Bank respectively of such "full juridical personality". The E.C.I.T.O. formula also appears to be unnecessarily complicated. All these formulae must therefore be regarded as a transitional stage in the evolution of a coherent doctrine of the legal capacity of public international organizations.

The formula adopted in the Charter of the United Nations has the outstanding merit of simplicity and does not presuppose any controversial attitude towards questions of a theoretical character. These are great advantages. On the other hand it deliberately omits any mention of the question of legal personality, and in these circumstances it may well be doubted whether there will be many countries in which it will suffice, in the absence of implementary legislation, to confer the necessary status and capacity on international organizations.

The question may be raised whether it is necessary to invoke the concept of legal personality for the purpose of defining the legal capacity of international organizations. The *fiction* and *reality* theories of corporate personality recur throughout the extensive and important literature which has been devoted to the question of the nature of legal personality,[2] but there is still no general agreement on the subject. Is it necessary to complicate the development of the law of international institutions with a concept which has inspired so luxuriant a literature? It is submitted that practical considerations require a regretful but firm affirmative answer to this question. It is true that the personality concept of the legal entity has been vigorously and convincingly criticized,[3] and if it were possible to deal with the matter on a purely doctrinal basis it might be desirable to eliminate it from provisions defining the capacities and powers of international legal entities, but international practice must always be expected to lag somewhat behind doctrinal analysis and, despite the wealth of controversy which it has provoked, the concept of legal personality is so much more widely understood in the majority of countries than any newer terminology that for practical purposes it would seem more convenient to continue using it to define the status of public international organizations as legal entities. It is of interest that in certain cases in which the instrument constituting an international organization does not specify that the Organization will enjoy legal personality it has been found necessary for the organization to recommend governments to take any action required under their law to enable it to discharge its functions effectively, and governments have found it convenient to take such action in a form tantamount to the recognition of the legal personality of the international organization. Thus the Council of the United Nations Relief and Rehabilitation Administration adopted at its first session a resolution recommending member governments to

[1] Cf. *Ballantine on Corporations*, Chicago, 1927, pp. 40–1, and cases there cited.

[2] E.g., Frederick Hallis, *Corporate Personality* (1930) and literature there cited.

[3] Alexander Nekam, *The Personality Concept of the Legal Entity*, Harvard University Press, 1938.

take any steps that they may consider necessary to enable UNRRA to exercise within their jurisdiction the powers conferred by Article 1, paragraph 1, of the UNRRA Agreement, which provides that the Administration "shall have power to acquire, hold and convey property, to enter into contracts and undertake obligations, to designate or create agencies and to review the activities of agencies so created, to manage undertakings, and in general to perform any legal act appropriate to its objects and purposes".[1] This formula is analogous to the provisions conferring specific legal powers contained in a number of the constituent instruments of the inter-war period,[2] but even in the United Kingdom, where the unincorporated association is exceptionally common, it has been found most convenient to deal with the matter by attributing to UNRRA the legal capacities of a body corporate.[3]

The Governing Board of the Pan-American Union has gone further in the absence of any constitutional provision than the UNRRA Council ventured to do and has recently recommended boldly that governments of the American Republics should recognize "that the Pan-American Union is an institution having international juridical personality".[4] It would seem desirable that new international constituent instruments should deal with the matter on similar lines. Even though created as instruments of co-operation between governments and not entrusted with direct authority over individuals or called upon to discharge operating functions on an extensive scale, public international organizations of a permanent character which have responsibilities of any substantial importance will almost always be called upon, in the course of discharging their responsibilities, to enter into a wide variety of legal relations with individuals and corporate bodies in connection with banking transactions, real property, contracts for supplies, public utility services, transportation and insurance, printing contracts, copyright[5] and other matters. These legal relations will be governed in part by principles of international administrative law and in part by the municipal law applicable to particular transactions. There is no assurance that the law applicable to them will include highly developed concepts of trust and agency which might make the question of legal personality a technicality of relatively little practical importance.[6] It therefore appears desirable that future international constituent instruments should specifically confer legal personality on the organizations created thereunder in all appropriate cases. There are several existing international instruments

[1] Resolution No. 32 of the First Session of the Council, para. 2.

[2] E.g., Convention for the Establishment of an International Institute of Refrigeration of 21 June 1920 as modified by Agreement of 3 May 1937 (Arts. 5 and 9); Statutes of the International Hydrographic Bureau of 21 June 1921 (Art. 43); Convention on the Establishment of the International Relief Union of 12 July 1927 (Arts. 8, 10 and 12) and Statute annexed thereto (Arts. 7, 8 and 9); Statutes of the Nansen International Office for Refugees of 19 Jan. 1931 (Arts. 11, 15, 16, and 17); and the majority of the international commodity control agreements, concerning which see International Labour Office, *Intergovernmental Commodity Control Agreements*, Montreal, 1943, pp. lv–lvi. Cf. also Rules for the Constitution and Procedure of the Intergovernmental Committee on Refugees, August 1944, Article XIII.

[3] Diplomatic Privileges Extension Act, 7 & 8 Geo. VI, ch. 44, Sec. 1 (2) (a), and Diplomatic Privileges (UNRRA) Order in Council, 1945, Statutory Rules and Orders, 1945, No. 79, Art. 2.

[4] Cf. the decision of the Italian Court of Cassation in *International Institute of Agriculture* v. *Profili*, 1929–30, *Annual Digest*, Case No. 254, pp. 413–15.

[5] C. Wilfred Jenks, "Copyright in respect of the Publications and other Documents of Official International Bodies", in *University of Toronto Law Journal*, vol. V, No. 1, 1943, pp. 71–94.

[6] Cf. Smith, H. A., *The Law of Associations*, Oxford, 1914; Warren, E. H., *Corporate Advantages without Incorporation*, New York, 1929; Lloyd, Denis, *The Law relating to Unincorporated Associations*, London, 1938; Maitland, F. W., *Collected Papers*, 3 vols., Cambridge, 1911, especially vol. 3, "The Unincorporate Body", pp. 275–84, and "Trust and Corporation", pp. 321 and 404; F. Pollock, *A Digest of the Law of Partnership*; Mestre, Achille and others, *La Liberté d'Association*, Paris, 1927.

which create full legal personality without the intervention of any system of municipal law and these may serve as useful models.[1]

It would also seem desirable that any national legislation necessary for the effective recognition of such personality should be enacted by the members of such organizations, as has already been done in the United Kingdom, on a temporary basis, by the passage of the Diplomatic Privileges Extension Act, 1944, which gives the Crown power to provide by Order-in-Council that an international organization shall have the legal capacities of a body corporate.[2] It is submitted that the Diplomatic Privileges Extension Act,[3] like the Statute of Queen Anne,[4] is to be regarded as declaratory of international law as a part of the common law;[5] that even in the absence of any statutory provision on the subject public international organizations would be entitled to exercise under English law the legal capacities of a body corporate, in the same manner as foreign sovereigns[6] and States[7] and foreign corporations,[8] whenever such capacities are expressly conferred by or can reasonably be implied from the constituent instrument of the organization concerned; and that the same principle is probably also applicable whenever such capacities are recognized by the law of the country where the organization has its seat, or are exercised by the organization on the basis of well established custom. It is of course well settled in English law "that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration

[1] See, for instance, Agreement No. II for the Settlement of Questions relating to the Agrarian Reforms and Mixed Arbitral Tribunals, 28 April 1930, Art. 2, Hudson, *International Legislation*, vol. V, p. 439, as supplemented by Convention for the Establishment of Fund A, 21 Aug. 1931, Art. 1, *ibid.*, vol. V, p. 462; Agreement No. IV concerning the Constitution of a Special Fund entitled Fund B, 28 April 1930, Art. 1, *ibid.*, vol. V, p. 466, as supplemented by Convention for the Establishment of Fund B, 21 Aug. 1931, Art. 1, *ibid.*, vol. V, p. 472; Statutes of the Assyrian Settlement Trustee Board, Article 2, *League of Nations Official Journal*, 17th Year, No. 1, Jan. 1936, pp. 22–4; Convention of 1940 for the Creation of an Inter-American Indian Institute, Art. 15 (U.S. 56 Stat. L. 1303).

[2] 7 & 8 Geo. VI, ch. 44, Sec. 1 (2) (a); the power has been exercised by the Diplomatic Privileges (UNRRA) Order-in-Council, 1945, Statutory Rules and Orders, 1945, No. 79, Art. 2, and by the Diplomatic Privileges (U.N.I.O., the Refugees Committee, and E.A.C.) Order-in-Council, 1945, Statutory Rules and Orders, 1945, No. 84, Art. 2.

[3] 7 & 8 Geo. VI, ch. 44.

[4] 7 Anne, ch. 12; *Barbuits' Case*, Cas. t. Talb. 281; *Lockwood* v. *Coysgarne*, 3 Burr. 1676, 1678; *Heathfield* v. *Chilton*, 4 Burr. 2015, 2016.

[5] H. Lauterpacht, "Is International Law Part of the Law of England"? in *Transactions of the Grotius Society*, vol. 25, pp. 51–88; Edwin D. Dickinson, "Changing Concepts and the Doctrine of Incorporation", in *American Journal of International Law*, vol. 26, 1932, pp. 239–260; C. M. Picciotto, *The Relation of International Law to the Law of England and the United States* (1915).

[6] *Hallett* v. *King of Spain* (1828), 2 bli. (N.S.) 31.

[7] *The United States* v. *Wagner, L.R.*, 2 Ch. App. 582; *The Sapphire* (1870) 11 Wallace 164.

[8] *Dutch East India Company* v. *Henriques* (1729), 2 Ld. Raym., 1532; 1 Str. 612. Cf. *Society for the Propagation of the Gospel* v. *New Haven* (1823) 8 Wheat. 464; Pillet, A., *Personnes Morales en Droit International Privé*, Paris, 1914, Secs. 42 and following; von Bar, Ludwig, *International Law, Private and Criminal*, translated into English by G. R. Gillespie, 2nd ed. (1892), Sec. 41. The earlier restrictive theory concerning the legal capacity of foreign corporations, exemplified in the United States in such cases as *The Bank of Augusta* v. *Earle* (1839) 13 Peters 519 and *Paul* v. *Virginia* (1868) 8 Wall. 168, is largely discredited; see Henderson, G. C., *The Position of Foreign Corporations in American Constitutional Law*, Harvard University Press, 1918. That theory, for which see Laurent, *Droit Civil International Privé*, vol. IV, Sec. 14, and Field, Dudley, *Outlines of an International Code*, 2nd edition, Sec. 545, has now been virtually abandoned everywhere, at least in respect of the civil as opposed to the functional capacity of foreign corporations. The restrictive theory was derived from the fiction theory of the nature of juridical personality and was coloured by the conception of corporations as monopoly franchises and by the desire to avoid evasion of national legal requirements by the device of foreign incorporation; these considerations have no application to public international organizations. On the general position of foreign corporations in English law see Edward Hilton Young, *Foreign Companies and Other Corporations*, Cambridge, 1912.

of the existing domestic law, requires legislative action",[1] but the creation by treaty of an international organization entitled as such to the legal capacities of a body corporate would not appear to involve any alteration of the existing domestic law within the meaning of this principle. Sir William Holdsworth has suggested[2] that "the test to be applied to ascertain whether an alteration of the rights of the subject is an alteration which the Crown cannot effect by treaty because it amounts to an alteration of the law, or whether an alteration of the rights of the subject is merely the incidental effect of a treaty, so that the Crown is able to make the treaty" is that "if the object of the treaty is the doing of an act which the Crown has power to do, e.g., the recognition of the status of a foreign sovereign power or a public ship or a cession of territory, the fact that it will have the effect of altering the rights of the subject will not preclude the Crown from making it," whereas if "its object is to alter the rights of the subject, it cannot take effect without the consent of Parliament, because in this case it amounts to an alteration in the law".

Judged by this test the attribution by treaty to an international organization of the capacities of a corporate person would be operative in the United Kingdom without legislation, and the existence of international arrangements attributing such capacity to an organization should be regarded as an act of State analogous to the other acts of State in respect of which, under modern English practice, a statement by the executive is regarded as binding by the courts.[3] There would also appear to be good grounds for regarding public international organizations as corporations at common law in the United States partly on the basis of the analogies of foreign States and sovereigns[4] and foreign corporations[5] and partly on the ground that some of the reasoning on the basis of which the United States itself[6] and the several States and territories[7] have been regarded as corporations would appear to be applicable, *mutatis mutandis*, to public international organizations. In the United States the ratification as a treaty of an instrument containing a provision attributing corporate personality to an international organization which is so expressed as to be self-executory will, in virtue of paragraph 2 of Article VI of the Constitution, give any such provision the status of a part of the supreme law of the land and thus make it unnecessary to rely upon the common law. Where such an instrument is not ratified as a treaty, legislation would presumably be necessary if the international organization was not considered entitled to corporate status at common law; in this connection it is of interest that the Bill to provide for the participation of the United States in the International Monetary Fund and the International Bank for Reconstruction and Development introduced simultaneously in the Senate and the House of Representatives on 15 February 1945[8] provides that the provisions of the Articles of

[1] *Attorney-General for Canada* v. *Attorney-General for Ontario* (1937), A.C., 326, 347; and see generally Anson's *Law and Custom of the Constitution*, vol. 2, Part 2, 4th ed., 1936, pp. 136–44, and A. D. McNair, *The Law of Treaties*, Oxford, 1938, pp. 7–37.

[2] "The Treaty Making Power of the Crown" in *Law Quarterly Review*, vol. LVIII, 1942, pp. 175, 183.

[3] The practice is summarized in Oppenheim, *International Law*, 5th ed., by Lauterpacht, vol. 1, p. 632, F. A. Mann, "Judiciary and Executive in Foreign Affairs", in *Transactions of the Grotius Society*, vol. 29, at pp. 148–9, and C. Wilfred Jenks, "The Authority in English Courts of Decisions of the Permanent Court of International Justice", in *British Year Book of International Law*, vol. 20, 1939, pp. 14–16.

[4] *The Sapphire* (1870) 11 Wallace 164.

[5] *Society for the Propagation of the Gospel* v. *Wheeler* (1814) 2 Gall. 104; see also Joseph H. Beale, *Foreign Corporations*, 1907.

[6] *Respublica* v. *Sweers*, 1 Dall. (Pa.) 41; *Dugan* v. *United States*, 3 Wheat. (U.S.) 172; *Dickson* v. *United States*, 125 Mass. 311.

[7] *State of Indiana* v. *Waram*, 6 Hill (N.Y.) 33; *People* v. *City of St. Louis*, 10 Ill. 351.

[8] 79th Congress, 1st Session, S 540 and H.R. 2211.

Agreement dealing with the juridical personality of the Fund and of the Bank "shall have full force and effect in the United States and its Territories and possessions upon the acceptance of membership by the United States in, and the establishment of, the Fund and the Bank respectively".[1] While the power to create federal corporations is severely limited in the United States,[2] the recognition of the legal personality of a public international organization would appear to be an act necessary and proper for the conduct of the foreign relations of the United States and therefore clearly included within the scope of the federal power.[3]

C. W. Jenks.

LEGAL ASPECTS OF THE RESTORATION OF ETHIOPIAN SOVEREIGNTY

Ethiopia was the first country to be freed from the oppressors. On the fifth anniversary of his leaving the capital of his country, Addis Ababa, the Emperor Haile Selassie returned there in May 1941, and was reinstated as the ruler of the country. There was indeed a short period of British military administration; but in January 1942 an agreement was made between His Majesty's Government and the Emperor, whereby the Government of the United Kingdom recognized that Ethiopia is now a free and independent state and the Emperor is its lawful ruler. The agreement, and the Military Convention attached to it, however, included provisions which involved a virtual temporary protectorate. [Cmd. 6334, Ethiopia No. 1, 1942.] The Emperor agreed to appoint British advisers to himself and his administration, and other British persons as police-officers and inspectors, and as judges and magistrates. And he agreed not to appoint other foreign advisers or officers except after consultation with the British Government (Art. II). In order to meet the financial needs of the country, Great Britain was to grant Ethiopia a small and diminishing subsidy for four years, and the Emperor agreed that there should be the closest co-operation between the Ethiopian authorities and the British advisers regarding public expenditure. In all matters relating to currency he would consult the British Government and make arrangements only with the concurrence of that government (Art. IV). While the Ethiopian Law Courts were restored, in the hearing by the High Court of any matter to which a foreigner is a party, at least one British judge should sit as a member of the court. And a foreigner could ask that any case, civil or criminal, in which he was a party, should be transferred to the High Court (Art. V). That was a limited survival of the system of Capitulations, which before the Italian occupations was still in force in Ethiopia.

As regards military affairs, the Emperor agreed not to conduct any external military operation which, in the opinion of the British Commander-in-Chief in East Africa, was contrary to the joint interest of Ethiopia and the United Kingdom (Art. X). He accorded freedom of passage in and over Ethiopia to British civil aircraft, and undertook not to allow other foreign aircraft to fly to, in or over Ethiopia without the consent of the British Government (Art. XI). The agreement was expressly temporary; and it was contemplated to replace it by a treaty after two years (Art. XII).

The gravest infringement of Ethiopian sovereignty was to be found not in the agreement itself but in the Military Convention attached to it. By that instrument

[1] Sec. 12.

[2] See, for instance, Ballantine, *On Corporations*, Chicago, 1927, pp. 53–4, and the cases and literature there cited.

[3] Cf. George Sutherland, *Constitutional Powers and World Affairs*, 1919.

large areas along the borders of the neighbouring territories of French, British, and Italian Somaliland, and the territory of Ogaden in the south of the Ethiopian state, occupied mainly by Somalis, were to remain under British Military Administration so long as the British Commander-in-Chief, in consultation with the Emperor, considered it necessary (Arts. 3–5). Moreover, cantonment areas in Addis Ababa and other towns were placed under British Military Administration (Arts. 6–7). Altogether a third of the territory of the Emperor, as it was before the Italian occupation, was removed from his jurisdiction, including the two chief towns after the capital, namely, Harrar and Diradawa. The fullest immunity from Ethiopian jurisdiction was granted to all "members of the British Forces", who included civilian officers of British nationality, accompanying and serving with the Forces, and their wives and children, and members of any Allied Forces serving in Ethiopia under the British command (Art. 1). The British Forces were given rights and emergency powers in Ethiopia as full as those taken by the Government in this country for purposes of war. They were to continue the military operation, management and maintenance of the only railway in the country, which was a mainly French enterprise and had its outlet in the French colony of Somaliland. They were also to continue the operation of the wireless transmitting station (Arts. 8–14).

All these infringements of the sovereignty of Ethiopia, which amounted to something in the nature of a *condominium*, as in the neighbouring Sudan, touched the pride of the sensitive Ethiopian people. After the two years, for which the agreement was made, had expired, the Emperor submitted new proposals for a fresh agreement which should be more in accord with the existing circumstances and with normal relations between allied sovereign states. The menace of invasion which, at the beginning of 1942, was the motive for the exceptional powers given to the British military authorities and Forces, had completely passed. Neither from the north, where Rommel then threatened, nor from the east, where the Japanese fleet might try a landing, was there any more a possible threat.

On the other hand, as the war was still undecided, it was not opportune to negotiate a permanent treaty with the United Kingdom. Till the peace settlement could be made, another temporary arrangement was proposed. The British Government, in the summer of 1944, sent out a mission under the headship of Lord De la Warr, to negotiate a fresh agreement with the Emperor and his Ministers. The agreement was signed in December of that year. (Ethiopia No. 1, 1945, Cmd. 6584.) It recites that circumstances have changed since the agreement and military convention of 1942 were concluded; and the two states desire as members of the United Nations to render mutual assistance to the common cause, and to conclude a new temporary agreement for the regulation of their mutual relations. The plenipotentiaries were the Prime Minister of Ethiopia for the Emperor, and Lord De la Warr for Great Britain. The new agreement supersedes also the military convention, and is, like the old, made expressly for a period of two years, when it may be denounced by either of the parties; or it may be replaced earlier by a regular treaty.

It is notable for the abandonment of most of those extraordinary privileges which were granted to the British Government and the British Military Forces. The precedence which was given to the British Minister in Addis Ababa is not retained (Art. II). The Ethiopian Government is free to retain or appoint other foreign persons as well as British to be advisers or officers of the administration and judges (Art. III). Jurisdiction over British subjects, British protected persons, and British companies is to be exercised by the Ethiopian courts without any special privilege. The condition that one British or foreign judge should be a member of the High Court when trying a British subject is inoffensively attained by the stipulation that *all* persons should have the right to demand, in the hearing

by the High Court of any matter, that one of the judges sitting should have judicial experience in other lands (Art. IV). That provision recalls the change made in the Palestine constitution of the judiciary, some years after the mandate was in operation. While originally only British and foreign subjects could ask for the presence of a British judge in a court trying civil or criminal matters in which they were parties, an amedment of the Palestine Order in Council later gave the right to any party to ask for the presence of a British judge, and so removed the stigma of discrimination against Palestinians.

The financial grant-in-aid is not maintained. The British Government was willing to give it subject to a certain control over its expenditure. But that condition was no longer acceptable.

The British Military Mission is maintained in Ethiopia as a unit of the British Military Forces. Its sole purpose is the organization, training and administration of the Ethiopian Army. And the head of the Mission is responsible to the Minister of War of the Ethiopian Government. The two together shall agree as to the disposition and movement of the members of the Mission, and the whole Mission may be withdrawn if, after consultation between the parties, either of them so desires (Art. VI). The British Forces undertake to give up the control and management of the railway as soon as they have from the Ethiopian Government an assurance that satisfactory arrangements have been made for its continued efficient operation (Art. V). The transfer is to be made with an undertaking by the Ethiopians that it will not prejudice the legal rights of the Franco-Ethiopian company, the French enterprise—which constructed the line. The matter will ultimately, no doubt, be a subject of international judicial settlement.

The immunity from the jurisdiction of Ethiopian courts and authority, which was granted by the earlier agreement to all members of the British Forces in the country, is by the new agreement restricted to members of the British Military Mission, and is also more limited in its nature. (Annex to Art. VI). The Mission is entitled to erect temporary buildings, to enter and to leave the country without let or hindrance, and to carry on Army postal services for the conveyance of correspondence of the Mission. A member of the Mission is not normally subject to the criminal jurisdiction of the Ethiopian Courts or to the civil jurisdiction in respect of any matter arising out of his official duties. But when the Ethiopian authorities consider that a member of the Mission has committed an offence against the law of the country for which he should be prosecuted, they are to send particulars of the offence to the head of the Mission; and if the Minister of Justice or the head of the Mission think it is desirable that the case should be tried by an Ethiopian court, this may be done with the assent of the head of the Mission. The jurisdictional position, therefore, of the members of the Mission is similar to that which was prescribed for members of the Allied Forces in Great Britain during the war.

The substantial limitation of the sovereignty of Ethiopia, which remains under the new agreement, is in respect of the reserved territories. The areas indeed which are reserved are substantially reduced, and the two towns are restored to Ethiopian jurisdiction; but "in order as an Ally to contribute to the effective prosecution of the war, and without prejudice to their underlying sovereignty, the Ethiopian Government agree that, for the duration of the agreement, the territories designated as the reserved areas and the Ogaden (province) shall be under British Military Administration" (Art. VII). The outward sign of Ethiopian sovereignty is secured by an agreement in letters attached that, wherever in the reserved areas the British flag is flown by the British Military Administration, the Ethiopian flag will be flown beside it under the same conditions. A more substantial concession is the recognition that all mineral and sub-soil rights in the territories belong to Ethiopia and may be fully exercised. The existing Ethiopian customs post shall

be maintained; Ethiopian troops, officials, nationals and vehicles have free and unhampered movement and passage along certain main roads in the reserved areas, and the Ethiopian postal system shall continue in the principal place of the Ogaden. At the same place an Ethiopian court with Ethiopian judges shall exercise jurisdiction, but under the authority of the British Military Administration.

While formal respect is paid to the maintenance of attributes of Ethiopian sovereignty, it is made expressly clear in the exchange of letters, attached to the agreement, that in the reserved areas, including the Ogaden, full administrative and judicial powers are given to the Government of the United Kingdom. The original proposals of the British Government indeed had been that these areas should be temporarily leased by Ethiopia to the British Military Administration. That, however, was found unacceptable by the Ethiopian Government, and the provision finally adopted is certainly more in accord with the conception of a temporary occupation which is not to interfere with the permanent sovereignty.

Another point on which the De la Warr mission met the Ethiopian susceptibilities was in regard to the treatment of private enemy property in Ethiopia. By the agreement of 1942 the Emperor accepted full responsibility for seeing that such property is dealt with in accordance with international law, and agreed to consult with the British Minister as to the measures to be taken to this end. In the new agreement nothing at all is said about the matter. But another attached letter, written by the Prime Minister to the head of the British Mission, gives the reason for the silence. The Emperor had issued a proclamation in 1942 about enemy property, and could therefore give the assurance that his Government did accept full responsibility for the enemy property entrusted to him in accordance with international law.

The Anglo-Ethiopian agreement of 1944 marks then a step forward in the reinstatement of Ethiopia as an independent sovereign state. The fact that she has now exchanged diplomatic representatives with the principal Powers among the United Nations, that she has been represented in all the conferences of the United Nations since 1942, and has had a delegation at the San Francisco Conference, confirm the recognition of her place in the new international order which will be substituted for the League of Nations.

NORMAN BENTWICH.

DECISIONS OF THE ENGLISH COURTS DURING THE YEARS 1943–4

Involving Points of Public or Private International Law

Note: In general, all relevant cases reported in the English Law Reports between June 1943 and January 1945 are reviewed in this number of the *Year Book*. As in the last *Year Book*, two important classes of cases are excluded, namely:
(1) Prize cases.
(2) Cases dealing with Trading with the Enemy.
These two classes of cases will be dealt with elsewhere.[1] All the cases in the period under review fall into the sphere of Private International Law.

There is one decision on domicile which is worth noting. It may be read with four decisions on this point which were dealt with in the 1933 number of the *Year Book* on pages 196, 197, and particularly with the case of *Boldrini* v. *Boldrini* there referred to. The present case is *May* v. *May*,[2] and was concerned with a petition for divorce presented by a German Jew against his wife in the English courts, and the question was whether the courts had jurisdiction, which they would not have had if the petitioner was not domiciled in England. The facts were that in 1938 M. was put into a concentration camp in Germany for Jews. He was released because he obtained an emigration visa to go to the United States. However, as his visa would not give him effective entry into the United States before the lapse of some time, the petitioner obtained from the Home Secretary of the United Kingdom permission to land in the United Kingdom as a "trainee" on condition that he would leave the United Kingdom on the completion of his training. M. landed in England in March 1939 and was followed by his wife and child. He began training as a sausage maker for F., and in June 1940, with his consent, his visa for entry into the United States was transferred from the register for emigrants from Germany to the register of intending emigrants from the United Kingdom. Shortly after this and until January 1941 he was interned as an enemy alien, but on release again resumed work for F. He did not reply to a communication from the United States Consulate in London saying that his visa for the United States should be cancelled if he had no intention of going there. It was clear that M. had no intention of ever returning to Germany, and the judge found as a fact that by January 1942 M. had abandoned the idea of going to the United States or of leaving England unless he was compelled to do so. He had relations and friends in this country and appeared to have settled down here and on these grounds it was held that he had acquired a domicile in England, the necessary fact of residence being coupled with the necessary intention to stay here indefinitely. The fact that M. was liable to be compelled to leave this country at the pleasure of the Home Secretary did not operate to prevent him acquiring a domicile here. On the last point the decision follows the *Boldrini* case mentioned above.

During the period under review, there have been some decisions on the question of the jurisdiction of the English courts to entertain petitions for decrees of nullity of marriage which require some reconsideration of the rules defining jurisdiction in nullity suits. As the result of certain decisions, principally the cases of *Salvesen* v. *The Administrator of Austrian Property*[3] and *Inverclyde* v. *Inverclyde*,[4] we thought that the position could be stated in the following way (see this *Year Book*

[1] As to the Trading with the Enemy Cases, see below, p. 288.
[2] 169 L.T. 43. [3] [1927] A.C. 641. [4] [1931] P. 29.

for 1932, page 171, and for 1938, page 252).[1] "In actions for nullity of marriage the English courts assume jurisdiction and recognize the jurisdiction of foreign courts (1) in any case where the parties are domiciled within the jurisdiction, and (2) where the marriage was celebrated within the jurisdiction, except where the suit is brought on a ground which makes the marriage voidable and not void. Residence is not a ground for jurisdiction in nullity." Under English law marriages are void when the parties are incapable of contracting the marriage in question, either because (1) they are already married (bigamy), or (2) they are within the prohibited degrees of consanguinity, or (3) the marriage ceremony was totally invalid because the legal requirements for celebration were not complied with. Marriages are voidable (1) when either of the parties is impotent or refuses to consummate the marriage, and (2) when there is mistake or fraud of such a character as to lead to the conclusion that there never was a *consensus* between the parties to be married. We take this occasion to correct an error made in 1932, when mistake was listed as a ground for making a marriage void rather than voidable.

If the decisions which we are about to review are accepted, the result would appear to be that we have to add the residence of the respondent as an additional ground on the basis of which the English court exercises jurisdiction in nullity and also to remove for this purpose the distinction between void and voidable marriages and to say that jurisdiction on the basis of residence or on the basis of the celebration of the marriage within the country is exercised whether the marriage is void or voidable. Possibly, though this is not yet clear, the rules for recognition of foreign decrees of nullity must be similarly enlarged.

Before considering the new cases it seems desirable to consider a little further the grounds on which the statements of the position in 1932 were based. There were two points to be considered here, namely, (1) the statement that residence is no longer a basis for jurisdiction, and (2) the distinction made between void and voidable marriages. In order to appreciate the position it is necessary to go back to the period before 1857, when the Matrimonial Causes Act of that year first invested our courts with the power to make decrees of divorce. The ecclesiastical courts then exercised the matrimonial jurisdiction and made decrees of nullity and of judicial separation. The residence of the respondent within the jurisdiction of the court was the basis of their jurisdiction, but they also exercised jurisdiction in nullity where the marriage had been celebrated in the country. Certainly where the basis of jurisdiction was residence, the ecclesiastical courts made no distinction between void and voidable marriages, nor, so far as the writer is aware, was any such distinction made when the jurisdiction was based on the place of the celebration of the marriage. The Act of 1857 did two things: (1) it gave the High Court power to make decrees of divorce, and (2) it gave to the High Court the former jurisdiction of the ecclesiastical courts in nullity and judicial separation and provided that in dealing with these proceedings the Court was to act upon the same rules and principles as the ecclesiastical courts had previously acted. The question then arose as to the principles which should define the jurisdiction of the Court in divorce. To begin with the court took the residence of the respondent as the basis, but in 1895 in the leading case of *Le Mesurier* v. *Le Mesurier*[2] the Privy Council decided that domicile and not residence should be the criterion. The grounds for this decision were that marriage was a matter of personal status and matters of personal status were governed primarily by the personal law (law of domicile). A divorce was a decision *in rem* making a change in a person's status and therefore belonged to the court of the territory in which the domicile was

[1] Dr. Cheshire, *Private International Law*, 2nd edition, p. 346, stated the position rather similarly.

[2] [1895] A.C. 517.

situated.[1] (As a matter of fact, if one takes the first half of the nineteenth century one finds English Private International Law in an early stage of development, and it was only gradually being made clear that the English criterion for determining the personal law was the law of the domicile as opposed to residence or nationality.) The decision in the *Le Mesurier* case settled the matter once and for all as regards divorce, but it is clear that the High Court continued to deal with nullity cases on the basis of residence, though it also began doing so on the basis of domicile. The position with regard to the recognition of foreign decrees of nullity remained very uncertain except for a recognition of the jurisidiction of foreign courts based on the celebration of the marriage in the foreign country concerned. Then came the *Salvesen* case in 1928, where the House of Lords recognized a foreign decree of nullity made in the courts of the domicile. But the judgments of the Law Lords went much further than this, seeing that they are full of strong expression of the principle of the supremacy of the law of the domicile and of the courts of the domicile in matters of personal status and declarations that nullity decrees are judgments *in rem* in matters of status. There are certain expressions which might have seemed to indicate that jurisdiction in nullity must be based upon domicile alone.[2] The reasons which led the House of Lords in the *Le Mesurier* case to choose domicile and reject residence as the basis of jurisdiction in divorce apply with equal force to domicile and residence respectively as a basis of jurisdiction in nullity.[3] There is no rational reason for making domicile the sole basis of jurisdiction in divorce and domicile *and* residence as concurrent sources of jurisdiction for nullity. Four years later in the *Inverclyde* case Bateson J., after a full consideration of the judgments in *Salvesen*, held that a distinction must be made between petitions for nullity based on grounds which make the marriage completely void and petitions based on grounds which make the marriage voidable only. He held that a decree annulling a voidable marriage was in all respects equivalent to a decree of divorce and therefore jurisdiction to make such decrees belongs solely to the courts of the domicile. On the other hand, where the marriage was absolutely void, it was not a case of making a change in a status which had been acquired but merely of declaring that a certain ceremony had never created a change of status at all because it was and always had been of no effect whatever. In these latter cases, therefore, he recognized a concurrent jurisdiction in the courts of the country where it was celebrated. From the point of view of common sense and principle, the distinction made by Bateson J. seems to have much to commend it. There is all the difference between a decree annulling a voidable marriage and one annulling a marriage which is void. A voidable marriage is and remains a valid marriage with all the consequences attaching thereto unless and until a competent court annuls it. When it has been annulled a woman who was legally a wife before the decree ceases to be one. Further, no one but the parties themselves can question a voidable marriage. On the other hand, in the case of a void marriage the position is that the woman never was legally a wife at all, though she may have honestly thought that she was. None of the legal consequences of marriage were created at all. A void marriage is void even though a

[1] I.e. as the tribunal of the personal law: the tribunal which alone could make a decree having extraterritorial validity under the rules of Private International Law. The English courts had come to the conclusion that domicile was the test upon which they based their recognition of *foreign* decrees before they had fixed it as the basis of their own jurisdiction. See *Shaw* v. *Gould*, L.R. 3 H.L., p. 55.

[2] For example, Lord Phillimore at p. 670: "As to the general principles of international law upon this subject as viewed by the British courts, it seems to me pretty clear that for the purpose of pronouncing upon the status of parties as well as for the purpose of affecting that status the court of the law which regulates or determines the personal status of the parties, if they are both subject to the same law, decides conclusively"; and see also on p. 671.

[3] The Law Lords in *Salvesen*'s case make this point.

court has not pronounced it so. Anybody can question a void marriage and it may be their duty to do so. For instance, a department responsible for paying allowances to the wives of soldiers would be under a duty to refuse to pay the allowance to the partner of a bigamous marriage, even if no court had declared it void. After these two cases there seemed reason to suppose that a real rationalization of our law had taken place and that decrees of nullity which were really equivalent to decrees of divorce would be regarded for Private International Law purposes in the same way as divorces,[1] and that residence as opposed to domicile had disappeared from the scene as a basis of jurisdiction. Both the *Salvesen* and the *Inverclyde* decisions were characterized by a broad, rational application of principle, rather than by a pedantic following of previous cases without a regard for the general development which had taken place in the law. As such they were generally welcomed and commended by writers on Private International Law.

The three recent cases which we are going to consider are (1) all decisions in the first instance, (2) all decisions on petitions which were unopposed, (3) decisions given in circumstances where to deny jurisdiction would be to create hardship for the petitioner. They may, therefore, be instances of hard cases making bad law. It may be that if they came for consideration later in a higher court they would not be followed, but they stand at the moment and it is perhaps probable that the legislator will intervene to make a wider change before the rules laid down in them come for review before any higher court.

We will now proceed to consider the three recent cases. The first is *White* v. *White*,[2] which was, in fact, dealt with in the 1938 number of the *Year Book* at page 252. In this case there had been a bigamous marriage celebrated in Australia. The respondent husband was at all relevant times both domiciled and resident in Australia. The petitioner wife was domiciled in England at the time of the ceremony and, unless she acquired the husband's domicile by virtue of the ceremony, was still domiciled in England. The petitioner wife was resident in England, and after the marriage, which was never consummated, returned to England alone, two days after the ceremony. The wife sought a decree of nullity in the English courts and obtained it. Bucknill J. gave two separate grounds for his decision: (1) that as the marriage was void, and as the petitioner had never taken up residence with the respondent in Australia, the petitioner had not acquired the respondent's domicile and remained domiciled in England, and therefore the English court has jurisdiction on the basis of domicile.

This ground of the decision, although it has received some criticism on the ground that confusion is brought about if two parties to a marriage are ever held to have separate domiciles, may on the whole be taken as being the better ground for the decision of the two. Where a marriage is completely void and the wife has never taken up residence in her husband's country there is some reason for holding that she has kept her own domicile.[3]

(2) That the English court had jurisdiction because the petitioner wife was resident in England. This ground may be criticized (*a*) because it reintroduced residence as a ground for jurisdiction in nullity and (*b*) because even if residence

[1] This is not the place to discuss the question of "classification" (or qualification or characterization as it is sometimes called) in Private International Law. But it is generally accepted that it is right to classify a legal process in the light of what it really is or does rather than by the name which it happens to be called. Incidentally it may be noticed that in most Latin or Continental systems of law marriages are generally *voidable* and not void when they are annulled. The children of marriages which are annulled are frequently legitimate, so that these decrees of nullity should be classified as divorces even more clearly than English decrees annulling voidable marriages.

[2] [1937] P. 111.

[3] Lord Phillimore in *Salvesen*'s case at p. 670, commenting on and partially excusing the decision in *Ogden* v. *Ogden*, suggests that a wife to a marriage declared void and who has not taken up residence in her husband's country may retain her original domicile.

is accepted as such ground it is not, according to the practice of the ecclesiastical courts which the High Court inherited, the residence of the petitioner which is relevant but only that of the respondent.

The next case is *Easterbrook* v. *Easterbrook*.[1] Here a marriage was celebrated in England between the respondent wife, who was then domiciled there, and the petitioner husband, who was a soldier serving in the Canadian Forces in England. The domicile of the petitioner was Canadian. The respondent had remained living in her parents' house in England all the time and the petitioner could be said to be resident in England if, but only if, presence in England as a serving soldier in an Allied force really constitutes residence at all (the judge held that the petitioner was resident in England, but it may be questioned whether this is correct and in any case the residence of the petitioner is not the important factor). The petitioner sought a decree on the ground that the respondent was unable or unwilling to consummate the marriage; that is to say on a ground which makes the marriage voidable but not void. The petitioner obtained his decree and it is clear that the judge rejected the distinction between void and voidable marriages for the purpose of jurisdiction in nullity. It is also clear that the judge considered that he was following *White* v. *White* in assuming jurisdiction to make a decree, but nothing else is clear about the judgment. The judge says that the respondent wife was domiciled in England, and in so finding he presumably considered he was following *White* v. *White*. But of course he was going further, because it is one thing to hold that the wife to a void marriage who does not take up residence in her husband's country does not acquire his domicile, and quite another thing to hold that the party to a voidable marriage does not do so. The voidable marriage is valid until it is annulled. It creates a change of status and therefore it is difficult to see how it can be said that it does not also create a change of domicile. While the judge may have adopted the domicile of the wife in England as one of the grounds of his decision, it is probable, however, that residence was another, and perhaps the principal, ground, and here at any rate the case is better than *White* v. *White* because the respondent was resident in England. Further, the marriage was celebrated in England, and if the distinction between void and voidable marriages is disregarded, then this may be another and perhaps the best ground for the decision.

The last case is *Hutter* v. *Hutter*,[2] where the facts are precisely the same as in the *Easterbrook* case except that it was an American instead of a Canadian soldier. A further difference, however, is that, though the case was undefended, the Attorney-General, acting for the King's Proctor, was asked to intervene and to present arguments on the question of jurisdiction and the judge delivered a long reasoned judgment.

A decree was granted and it is plain that residence was the principal ground for the assumption of jurisdiction. The judge relied on Section 22 of the Matrimonial Causes Act, 1857, which provided that the court in all suits other than suits for divorce should proceed according to the principles and practice of the ecclesiastical courts (a section which is repealed but replaced by Section 32 of the Judicature Act, 1925, which for present purposes has the same effect). He then states that the ecclesiastical courts had exercised jurisdiction in nullity suits wherever the respondent was resident in the jurisdiction, even if the marriage had been celebrated abroad. He further showed that the ecclesiastical courts, in exercising jurisdiction based on residence, had done so both in the case of void and of voidable marriages. Further, the judge pointed out that the ecclesiastical courts and the High Court after them had exercised jurisdiction in nullity suits when the marriage had been celebrated in this country even if the parties were

[1] 60 *T.L.R.* 80. [2] 40 *T.L.R.* 541.

domiciled abroad (and I think resident abroad, although the judge does not say so), but here he refers to nullity based on consanguinity, bigamy, irregularity, &c. (which are all cases of void marriages) and does not make it quite clear whether he thought that any distinction between void and voidable marriages could be made where the jurisdiction was sought on the ground of the place of celebration. On the whole the general impression to be derived from a rather hesitating judgment is that he rejected the distinction for all purposes. It is to be noted, however, that he did so merely on the ground that he could not find that ecclesiastical courts had made any such distinction, and not on the ground that in fact there was no such distinction to be drawn. Confidence in the reasoning of the judgment is not increased by his citation of the case of *Galene* v. *Galene*[1] apparently in support of the absence of any distinction between a void and voidable marriage. The marriage in *Galene*'s case was voidable and the marriage had been celebrated in England between parties who seem to have been at all relevant times domiciled and I think resident in France, but he appeared to have failed to notice that the ground for the declaration of nullity in that case was the fact that the French courts, the courts of the domicile, had already declared the marriage void, so that this case is no support whatever for his view.[2] Finally, the judge seems to have been disposed to hold if necessary that the wife had retained her domicile in England and to claim jurisdiction on that ground, though it is not the ground on which he relied. He refers to *White* v. *White* in this connexion and he also says that the American soldier husband was to be regarded as resident in England.

While one may be tempted to feel dissatisfied with the reasoning of this last judgment, it seems probable that the legislator may intervene in this sphere before long. The fact is that the principle that domicile is the sole basis of jurisdiction in divorce, coupled with the rule that the domicile of the wife is that of the husband, produces many hard cases. Already by the Matrimonial Causes Act of 1937 (Section 13) one statutory exception to this had been introduced giving the English courts jurisdiction in cases where a wife had been deserted by her husband (or the husband had been deported) and the husband was before the desertion (or deportation) domiciled in England, although at the time the proceedings were brought he had acquired a domicile elsewhere. Then by the most recent Matrimonial Causes (War Marriages) Act, 1944, a further exception is introduced in the case of marriages celebrated during the war where the husband was domiciled outside the United Kingdom and the wife was before the marriage domiciled in England. The English court has now jurisdiction in these cases. This is, of course, only a temporary Act and designed to cover the particular case of war-time marriages, especially where the husband is a member of a Dominion or Allied force serving in this country. It does not apply unless the petition is presented within five years of the end of the war nor if the parties ever reside together in the husband's country. It is unlikely, however, that the question can be left where it now stands. If there should be further legislation there are three suggestions which we should like to present for consideration.

(1) Whatever rules the new Act makes for the future jurisdiction of the English courts in matrimonial causes should be applied reciprocally so that foreign decrees are recognized in like circumstances, and the future Act should provide this expressly. Neither of the two provisions which have just been referred to above does this.[3]

[1] [1939] p. 237, reviewed in this *Year Book* for 1944.

[2] Cp. Lord Haldane in *Salvesen*'s case, p. 659, "The question is simply whether, when the court of the domicile has pronounced the marriage to be void—a court here where they are not domiciled can review their decision. The reasons are conclusive against any attempt to reopen the decisions."

[3] The Act of 1944 contains a complicated and limited provision relating to decrees of courts in territories within the British Empire.

(2) It is probably desirable that the English courts should exercise jurisdiction both in divorce and in nullity on the basis of grounds additional to domicile, but where the courts are exercising it on some other ground than domicile[1] they should not ignore the law of the domicil[1] and it should be directed that before a divorce is granted they must be satisfied that not only is there cause for divorce according to English law but also according to the law of the domicil[1] This practice is followed in some other countries, substituting in some cases nationality for domicile because according to their systems nationality is the criterion for personal status.

(3) The rules for jurisdiction should be the same for nullity as for divorce except that the courts of the country where the marriage is celebrated should always have jurisdiction to declare the marriage void on the ground that the marriage conflicted with the internal law of that country relating to the celebration of marriages there and was for that reason void or voidable under that law. Emphasis is laid on the word "internal" in the previous sentence, because it is thought that where the objection to the marriage is based on something arising from the law of the domicile or nationality of the parties the courts of the country where the marriage is celebrated have no particular competence or interest in that issue.

After so much consideration of the question of jurisdiction in suits for nullity of marriage, and incidentally in suits for divorce, it is convenient to have a case dealing with jurisdiction in suits for judicial separation. A decree of judicial separation, unlike a decree of nullity or divorce, in no ways affects the status of the parties, but merely gives to one of the parties a certain protection from certain consequences of that status when the conduct of the other party justifies it. Consequently, from the theoretical point of view a petition for separation is more analagous to an application for maintenance and falls within a sphere where the country of residence necessarily has a direct interest and a duty.

In this case, *Simm* v. *Simm*,[2] the wife sought a decree of judicial separation on the ground of desertion by her husband. The wife was resident in Scotland, the husband in England. The husband, and therefore the wife, were domiciled in Scotland, where the marriage had been celebrated. The husband contested the jurisdiction of the English courts to entertain the petition on the ground that the proper statement of the relevant rules was that contained in Dicey's *Conflict of Laws*, Vth edition, at page 288, where it is stated that the English courts have jurisdiction to entertain such petitions (1) if the domicile is in England and (2) if both parties are resident in England and (3) if the matrimonial home is in England. Here the domicile was in Scotland, only one party was resident in England and the matrimonial home was in Scotland, where the husband had lived with his wife and children until the time of the desertion. It was held by Pilcher J. that the court had jurisdiction on the ground that the residence of the respondent alone was sufficient. In this he was following the practice of the ecclesiastical courts before 1856, which the High Court is directed to follow by the relevant statutory provisions. As an alternative ground he held that a wife not legally separated from her husband could always be legally regarded as being resident at the place where her husband resided and on such a view the wife also could be regarded as resident in England. The decision shows that the statement of the position in Cheshire's *Private International Law*, 2nd edition, page 372, was more accurate than that of Dicey. Cheshire stated that the possession by the respondent of a residence within the jurisdiction was sufficient and it was not necessary that both parties or the matrimonial residence should be situated there. It may be noticed

[1] Domicile is here used as meaning the country whose law is regarded as the personal law. If some other criterion for determining the personal law were adopted, this expression here would require reconsideration.

[2] 60 *T.L.R.* 556.

in passing that there have been some decisions in the past where a somewhat temporary presence within the country of the respondent coupled with a proper residence by the petitioner seems to have been held to be sufficient (vide *Armitage* v. *Armitage* [1898] P. 178 and *Chetti* v. *Chetti* [1909] P. 67). In both of these cases it was the petitioner wife who was certainly resident in this country, and the respondent husband only temporarily present, so that the alternative ground of decision adopted in this case would not apply.

There is a curious case this year which relates to the question of guardianship of infants. In the last number we reviewed two cases on this subject, but the present case is rather a different one. In the case of *In re X's Settlement*[1] the husband and wife were domiciled in Scotland and there was a marriage settlement executed by the wife in favour of their two children. Proceedings had been instituted in the English courts for the administration of the settlement and the two children had been made wards of court. The husband then instituted proceedings in the Scottish courts for divorce in which he was desiring to claim the custody of the children. He had been advised by his Scottish lawyers that the Scottish courts might have some difficulty about dealing with his application for custody, although the application was within the jurisdiction of the Scottish courts, because the children had been made wards of court in England in the proceedings on the settlement. He therefore by a summons asked the English courts to give him leave to apply to the Scottish court for custody and to comply with any directions in that regard given by the Scottish courts. The English courts claim jurisdiction to make any infant a ward of court respecting whose personal property an action or other proceeding has been instituted in the Chancery Division. When an infant is made a ward of court, the court places itself to some extent in the position of a guardian of the infant both in parental matters and as regards the property of the infant. For instance, the ward cannot be taken out of England without the leave of the court, the court can give directions to the guardian with regard to the education of the infant, and a ward of court cannot marry without the consent of the court. It is clear that when an infant is made a ward of court in circumstances where the domicile is not English there are possibilities of conflict with foreign courts of the domicile who may have a perfect right to appoint guardians. Moreover, the English court will sometimes make a child a ward of court when the child is physically outside this country altogether, as is shown by the case of *In re Liddel's Settlement* dealt with in the 1937 number of the *Year Book* at page 231. There seemed to be the possibility of a conflict in the case of these children between the English and Scottish courts. Vaisey J. refused to make any order on the summons in the present case. He said it was for the Scottish courts to consider what measure of regard they should pay to the fact that these children had been made wards of court in England when they considered the husband's application for custody in his divorce proceedings. Perhaps the Scottish courts would consider it was for the English courts to decide what measure of regard they should pay to any order with regard to the custody which the Scottish courts might make. The English courts would certainly pay fullest respect to any order which the Scottish courts might make, and he had no doubt that the Scottish courts would pay due regard to any orders with regard to these children that the English courts would make and conflict between them was entirely out of the question.

In substance the answer seems to be *solvitur ambulando*, each court paying great regard to the orders of the other court. One can imagine, however, foreign courts having some difficulty both in understanding the English practice with regard to wards of court and also in seeing why they should pay any particular regard to

[1] 1944 *Weekly Notes* 237.

an order of an English court making a child a ward of court when the child was not a British subject or domiciled here and perhaps merely on the ground that the English courts were concerned with some question with regard to its property and when the child was at most perhaps temporarily present in the country. On principle it would seem that both the courts of the country of the personal law (e.g., domicile in our system)[1] and the courts of the country of the residence of the children must have jurisdiction to make orders with regard to guardianship and custody. The cases in which and the reasons for which this jurisdiction should be exercised would seem to be different. Jurisdiction on the basis of domicile would be exercised for reasons of family law, including the award of custody in divorce, and jurisdiction on the basis of residence because of some immediate need for the well-being of the children. The English courts exercise jurisdiction in both classes of cases and make decrees of custody in divorce where the children are living abroad. The Court of Appeal in *Philips* v. *Philips* (61 *T.L.R.* 395) refused to disturb an order made in the Divorce Court awarding custody to one spouse when the children were in Canada. Where a foreign court of the personal law appoints guardians and the children are in England, the position would seem to be that the foreign guardians possess this status in England unless and until an English court awards custody to some one else. If the matter comes before the English court the foreign appointment gives a claim, but it is a claim which may be set aside in the same way as the claim of a parent may always be set aside in the interest of the children. There are cases where this has been done and other cases where the foreign guardian has succeeded (see the last number of this *Year Book*).

But the rather special and curious jurisdiction to make a child a ward of court can (theoretically at any rate) be exercised where the child is not a British subject and not domiciled or present in England and in the event it would go outside any principle of Private International Law. The writer does not, however, know of any case where it has been exercised in these circumstances.

E.

[1] But possibly *also* nationality for guardianship; see last number of the *Year Book*.

DECISIONS OF THE ENGLISH COURTS RELATING TO TRADING WITH THE ENEMY IN THE YEAR 1944

Introduction

The year 1944 has seen only a small number of decisions bearing on this subject. They throw some further light upon the enemy character of Companies, the position of a branch business of an enemy house of trade, on minor points concerning the effect of enemy occupation of territory, and on the personal status of individuals affected by enemy residence or domicile.

Case No. 1. In *In re Ring Springs Limited's Letters Patent* [1944] 1 Ch. 180; 170 L.T. 185, a company applied by originating summons in the Chancery Division for extension of certain Letters Patent owned by it. The application was made under the Patents and Designs Acts, 1907 to 1942, Section 18 (6), which provides: "Where, by reason of hostilities between His Majesty and any foreign State, the patentee as such has suffered loss or damage . . . an application under this Section may be made, by originating summons instead of by petition, and the court in considering its decision may have regard solely to the loss or damage so suffered by the patentee." The Section concludes with the following proviso: "Provided that this sub-section shall not apply if the patentee is a subject of such foreign State as aforesaid, or is a company the business whereof is managed or controlled by such subjects or is carried on wholly or mainly for the benefit or on behalf of such subjects, notwithstanding that the company may be registered within His Majesty's dominions." "Such subjects" means subjects of a foreign state with which His Majesty is at war. This company was incorporated in England and at the outbreak of war with Germany had an issued share capital of £3,400 in £1 shares, of which 100 founders' shares carrying special rights and 2,600 ordinary shares were owned by the German company, Ringfeder G.m.h.H. The remaining 700 ordinary shares were owned by the British directors. The company on its incorporation in 1926 had acquired by agreement with the German company certain patents and patent applications relating to springs. A clause of the sale agreement provided that the company should pay to the vendor (the German company) one quarter of all sums of money or other consideration received by the company either by way of purchase money or by way of royalty or otherwise from the sale or grant of licences under the patent.

Opposition to the extension of the patents by the court was advanced by the Comptroller-General of Patents on two grounds:

(*a*) That the provision in the Sales Agreement whereby the company undertook to pay to the German company one quarter of all sums of money or other consideration received by way of purchase money or royalty from the sale or grant of licences under the patents meant that the business of the company was carried on wholly or mainly for the benefit of the German company. This contention was negatived by Mr. Justice Simonds on the grounds that the word "mainly" in the proviso was itself sufficiently vague and that the facts (which showed that from the outbreak of war the Company was engaged wholly upon the manufacture of other articles for the Ministry), displaced the suggestion that the business of the company came within the relevant proviso.

(*b*) The Comptroller-General's second contention raised a point of more general interest. It was based on the fact that the majority of the shares in the

company had been owned by the German company, on their subsequent vesting in the Custodian, and on the sale of the shares by the Custodian to the British directors. He contended that (i) from the outbreak of war to the date of the Vesting Order, and (ii) from the date of the Vesting Order to the date of the sale of the shares by the Custodian to the British directors, the business of the company had been carried on for the benefit of the German company. This contention also was rejected. Mr. Justice Simonds pointed out that owing to the fact of the ownership of the shares by the German company having continued up to the date of the Vesting Order, he could not take into consideration any losses suffered by the company during the period prior to the Vesting Order.

The Judgment continued as follows:

"The greater difficulty arises in regard to the period between the vesting in the Custodian and the sale by him of the shares. It was held that the effect of a vesting order under the Trading with the Enemy Acts in the last war was to create an anomalous position (otherwise almost unknown to our law): the beneficial ownership of vested property was in statutory abeyance (see *In re Munster*, 1920, 1 Ch. 268; 122 L.T. 411). In this respect I can see no different result arising from a vesting order that was made under the present Trading with the Enemy Act, 1939. If so, from the date of the vesting order, 13 January 1941, to the date of the sale, the beneficial ownership in the shares formerly held by the enemy was in statutory abeyance: the legal title was in the Custodian."

In applying this set of facts to the words of the proviso to Section 18 (6) of the Patents and Designs Acts, the Judge pointed out that the German shareholders may, or may not, in the days to come, obtain in cash or in kind the proceeds of sale of their shares, but that in either case he was unable to say that during the period in question the business of the company was in fact carried on for their benefit.

This decision confirms: (*a*) that the effect of the Vesting Order vesting enemy-owned property in the Custodian is to deprive the former enemy owner of all right, title and interest in that property; (*b*) that the company which on the outbreak of war possessed enemy character can lose that character during the war through the vesting of its enemy-owned shares.

Case No. 2. *The "Glenroy"* (No. 2) 170 L.T. 306: This was an action in prize in which His Majesty's Procurator-General sought the condemnation of a cargo of beans. A British ship in November 1939 on voyage from Far Eastern ports to Hamburg was diverted by order of the naval authorities to Liverpool and there discharged a cargo of beans consigned by the Mitsui Company in Japan to its own subsidiary company incorporated in Germany carrying on business at Hamburg. The cargo was seized in prize. The London branch of Mitsui entered an appearance and claimed the release of the cargo. On the entry of Japan into the war the Board of Trade appointed a Controller, at first to control, and subsequently to wind up the London business. The Controller pursued the proceedings in the Prize Court, resisting the condemnation of the cargo. Originally his case was so framed as to bring before the Court two alternative claims, one on behalf of the Mitsui Company and the other on behalf of the business of the London branch. The Crown, however, took objection to the right of the Controller to pursue his claim in these capacities. There was a separate trial on this preliminary point. The President, in an interlocutory Judgment, held that an alien enemy was not in general in a position to pursue a judgment in the Prize Court without a Royal Licence, but that the Controller as representing the business of the London branch of the Mitsui Company, a notional entity recognized in law as

distinct from the company resident in Japan, had full capacity to continue the proceedings. At the subsequent trial the Crown based its claim for condemnation of the cargo on three grounds:

(1) That under the contract of sale, the property in the goods had passed to Mitsui, Hamburg, before the outbreak of war. On the construction of the contract this claim failed.

(2) That, whether the property had passed or not, the cargo, having been consigned to Hamburg and seized in course of transit to that destination, was contraband. This claim failed on the particular facts.

(3) That, on the assumption that the property had not passed to the German branch of the Mitsui Company, that branch, although it was a company registered in Germany and therefore in law a corporate entity separate from the Japanese company, was at all material times wholly controlled by the Japanese company and really its German branch, and that the goods were therefore the trade or the concern of an enemy house of a neutral trader. This contention also failed. It is in connection with the argument on this point that some light was thrown on the question of enemy character of a branch business.

The trial on this point proceeded on the basis that the Mitsui Company in Japan was a neutral. Japan became a belligerent in December 1941, and at the date of the trial a claim made by the Controller of the London business was made on behalf of a branch of what had then become an enemy business, but all the other circumstances on which the claim was founded had come into existence before Japan entered the war. The right of the Controller to pursue this claim had already been decided at the preliminary hearing. The Crown's argument on the third point was based upon the settled legal doctrine that in the case of an individual neutral firm having a trade or branch in the enemy country, while the business as a whole is regarded as neutral this is not so as regards so much of the business as is shown to be the concern of the enemy house of trade, and goods involved in its transactions may be condemned in Prize as if they were enemy goods. In such a case the failure after the outbreak of war to close the enemy house of trade justifies the condemnation of the goods, even though they were shipped before the war. The Crown asserted that the German company, though a separate entity in law, was wholly controlled by the Mitsui Company which held all the shares, and was in substance merely a branch, situated in Germany, of the Mitsui Company in Japan.

The President rejected the claim and pointed out that the incorporation in Germany of the German company was the creation of a separate entity recognized by German law, capable of holding property and employing servants, and above all entering into contracts for sale of goods with among others the Mitsui Company itself. He said, "It seems to me that there is an essential distinction between employing servants or agents, whether they may be partners or mere employees, to buy or sell for the parent firm or company without having any property in the goods dealt with distinct from the property of the parent concern, and establishing a separate corporation to buy *from* or sell *to* the parent concern goods in which such corporation parts with or acquires the property, as the case may be, and in respect of the sale or purchase of which it earns profits or bears the loss on behalf of its own shareholders, even if such shareholders are nominees of the parent company. . . . There seems to me to be no room for importing the notion of a 'house of trade' which is applicable to a single commercial entity, part of whose business consists of trade in an enemy country. . . . If this argument on behalf of the Crown be right, this neutral corporation could never escape condemnation of any goods involved in a pre-war transaction, however innocent, with its sub-

sidiary company in Germany—if the property has passed, because the goods are enemy property; and if the property has not passed, because they would be deemed contrary to the fact to be enemy property. There seems to me to be no warrant for such a contention either in principle or on authority."

Note.—This decision has recently been reversed by the Privy Council, [1945] A.C. 124.

Case No. 3. *Pelepah Valley* (*Johore*) *Rubber Estates Ltd.* v. *Sungei Besi Mines, Ltd.* 170 L.T. 338. In this case it was held that the occupation of the State of Johore by the Japanese did not operate as a frustration of a mining sub-lease and that a payment due thereunder continued to be payable. The plaintiff company claimed payment from the defendants of the balance of an annual instalment of £5,000, payable within three months of the 15th August 1942. The payment was claimed under an agreement of the 10th October 1941, which was the last in date of a series of agreements concerning a mining sub-lease of certain land in the State of Johore, in which the defendants had acquired tin-mining rights; defendants had also assumed an obligation to pay by instalments a sum of £27,829. In January 1942 the sub-lease had eleven years still to run and the defendants, as sub-lessees, had under these agreements the right to call upon the sub-lessors to apply for a renewal of the head-lease and to grant them a sub-lease for the period of the renewal. On or about the 28th January 1942 the Japanese Armed Forces occupied the whole of the State of Johore; the defendants' European staff were interned, and the defendants had received no benefit from and had no access to the mines.

The chief defence to the claim for payment was that the enemy occupation was an event that frustrated the contractual relationship between the parties to the sub-lease. Mr. Justice Tucker rejected this defence and gave judgment for the plaintiffs. He rejected the frustration doctrine on two grounds: First he dealt with the intention of the parties at the date of the earliest of the agreements, i.e. the 11th December 1929, which led to the grant of the sub-lease. He said: "It is, I think, necessary to decide whether or not, when the contract was entered into, both parties would of necessity have agreed that in the event that had happened by the 28th January 1942 the contract should be not merely suspended or modified but completely destroyed and both parties automatically discharged. . . . I find it impossible to say of a contract of this nature that both parties would have so agreed. It appears to me quite possible that in such circumstances the defendants might have elected to take their chance of the Japanese being evicted within a reasonable period so that they might have an opportunity of reaping the benefit of the money they had expended during the remainder of the thirty-two years. . . . A mining lease of this kind with several years to run and a reasonable prospect of renewal bears little resemblance to the usual commercial contract for the delivery of commodities or machinery to which the doctrine of frustration has so often been applied."

Secondly, the court held that there was no authority for applying the doctrine of frustration to a lease, and that in this respect there was no distinction to be drawn between this kind of lease and any other kind of lease.

The defendants had raised a further ground of defence, namely, that any title in the head-lease or sub-lease had been destroyed by an "act of state" which the courts were bound to recognize, such act of state being the effective conquest of Johore by the Japanese. The court, however, held that the principles on which this contention was based were wholly inapplicable to the capture of British or Allied territory by the enemies of this country during a war which was still in progress, and while British and Allied Forces were actively engaged in endeavouring to evict the enemy from the territory in question.

Case No. 4. *In re Cohn deceased* [1945] 1 Ch. 5; 171 L.T. 377. This case involved the administration of a deceased's estate where a mother and daughter were killed together in a London air raid. Both of them were German nationals who retained their domicile in Germany though they were resident in England. The Custodian of Enemy Property claimed the movable property on the footing that it had passed to the daughter; (it is presumed that the daughter's next of kin were resident in Germany and therefore "enemies" within the meaning of the Trading with the Enemy Act, 1939). The mother had left a will made in Germany under German law under which the daughter would have been entitled to an interest in the movable property if she survived her mother. The Custodian relied on Section 184 of the Law of Property Act, 1925, concerning commorientes under which, on the facts of this case, the younger would be deemed to have survived the elder. But the court (Uthwatt J.) rejected this contention and decided that the law of the domicile, i.e. of Germany, was alone relevant; under an express provision of the Civil Code of Germany the mother and daughter were presumed to have died simultaneously. In consequence the daughter took no share in her mother's estate, which passed to other children who had survived her.

E. F. Q. Henriques.

REVIEWS OF BOOKS

The American Journal of International Law. Volume 38, 1944. Published by the American Society of International Law, 700 Jackson Place N.W., Washington D.C. 786 pp. and Supplement Section of Documents (228 pp.).

This volume of *The American Journal of International Law* maintains its traditionally high standards. It contains a number of valuable articles, and although it would be arbitrary to single out any of them, there are some which are particularly topical and informative and to which, therefore, the attention of English lawyers should be drawn. Among them we would mention Hammer and Salvin, "The Taking of Hostages in Theory and Practice"; Schwelb, "The Status of the United States Forces in English Law"; Nussbaum, "International Monetary Agreements"; Fairman and King, "Taxation of Friendly Foreign Armed Forces"; Quincy Wright, "The United States and International Agreements"; Franklin, "Municipal Property under Belligerent Occupation"; Herbert Wright, "The Legality of the Annexation of Austria by Germany". The Editor-in-Chief, Mr. George A. Finch, contributes an affectionate appreciation of the work of the late James Brown Scott who died in 1943.

Editorial Comment and Current Notes deal with many interesting problems. In a remarkable note on the international status of Germany to be established immediately upon the termination of the War Professor Kelsen shows the difficulties which would arise if Germany were subject to belligerent occupation, and suggests that the occupying Powers should establish a condominium.

A number of decisions are reported; among them there is a noteworthy judgment (since reversed) of the Magistrate's Court of the County of Renfrew, Ontario, which held that a prisoner of war is not punishable at common law for attempting to escape or for doing anything reasonably calculated to assist in that escape or to preserve his liberty.

The bulk of the space allotted to Official Documents in the Supplement is taken up by "International Law of the Future. Postulates, Principles and Proposals", which are submitted by a group of North American lawyers to aid in revitalizing and strengthening international law and in laying the bases of a just and enduring world peace. Among the published documents the most immediate significance attaches to the UNRRA Agreement and certain Resolutions and Reports of its Administration.

F. A. M.

Annual Digest and Reports of Public International Law Cases (1919–42).

With the appearance of the volume of *Public International Law Cases* for the years 1941–42,[1] the *Annual Digest* celebrates its tenth birthday. This publication is now so well established in the literature of international law that its importance as marking a new departure in the study of the subject is apt to be overlooked. Before its appearance there were indeed such collections of opinions and judicial decisions bearing on international law as La Fontaine, *Pasicrisie Internationale* Martens, *Causes Célèbres du Droit des Gens*, Lapradelle-Politis, *Recueil des Arbitrages Internationaux*, and various case-books on international law. The *Annual Digest* differed from all these in two salient points. It was (*a*) a collection of contemporary decisions appearing annually (or at least biennially), (*b*) a collection which included not only decisions of international tribunals but also the reports or digests of the decisions of municipal courts. In the emphasis it laid on the latter it broke new

[1] Edited by H. Lauterpacht, M.A., LL.D., pp. xxxvi and 651, Butterworth's, London, 1945. Price 55s.

ground. International lawyers in different countries had of course taken note of the decisions of their respective national courts, and appraised or criticized them according to the degree of respect which was usual in their countries with regard to judicial opinion. In Great Britain and the United States there is a strong tradition in favour of judicial precedent. But the idea that from the decisions of the municipal courts of all civilized nations it might be possible to build up a body of case-law was entirely new. Such was the conception which inspired Professor Sir Arnold McNair and Professor Lauterpacht to publish the first volume of this series in 1929.[1] This they described as an experimental volume, but speaking of their labours they said (Preface, p. ix): "The resulting mass of raw material forms a body of authority which both in quality and in variety has exceeded our expectations". Of the juridical value of these decisions of municipal courts they said: "We shall confine ourselves to the remark that in any field of human activity it is impossible for one mind faced with the task of solving a problem not to give weight to the solution of a similar problem which has commended itself to another mind elsewhere. That is not a principle of law but of common human experience". This reflection expresses what must still be the proper approach to the *Annual Digest* from the standpoint of the practising lawyer. On the theoretical side readers of this *Yearbook* for the year 1929 were introduced to a startling and novel doctrine regarding the true place of municipal decisions in international law. In that year Professor Lauterpacht's article on "Decisions of Municipal Courts as a Source of International Law" appeared. The *Annual Digest* was the practical expression of a view expressed there which has proved in some respects to be prophetic: "By not availing themselves to the full of the lessons of municipal decisions, international lawyers have debarred themselves from access to a rich source of development of international law. In the long run such an attitude cannot fail to impair in those called upon to render these decisions the sense of responsibility for a comprehensive and scientific treatment of international law. It would be an advantage if judges could know that their decisions on matters of importance to international law are studied not only by the lawyers of their own country but also, through a system of easily accessible reports, by scholars and students abroad intent upon learning from judges conscious of the international character of their functions". (This *Yearbook* for 1929, p. 94.) Since its first appearance the *Annual Digest* has been increasingly used and cited in cases involving points of international law before municipal courts.[2] As to the legal value of municipal decisions in the formation of doctrine, the highest tribunal in the British Empire in 1934 approved the view that they are among the sources from which international law is derived.[3]

Turning to the volumes themselves, nobody could deny that in quantity (these volums cover more than five thousand pages), scope (the whole field of international law is represented), and interest (the facts dealt with are fascinating in their variety),

[1] The *Annual Digest* will be cited hereafter under the abbreviation *A.D.* The first volume was a collection of cases decided in the years 1925–6; then followed the volume for the years 1927–8 in 1931. These volumes appeared under the joint editorship of Professor Sir Arnold McNair and Professor Lauterpacht. The years 1919 to 1922 and 1923–4 were covered by volumes published in 1932 and 1933 under the joint editorship of Sir John Fischer Williams and Professor Lauterpacht. In 1935 the sequence was resumed by a volume covering the years 1929–30. This volume and the five succeeding volumes appeared under the editorship of Professor Lauterpacht alone.

[2] From a perusal of the volumes of the *Annual Digest* it would appear that they are more frequently cited in American courts than in England. For a recent case where the *Annual Digest* was cited in an English court, see *R.* v. *Ketter* [1940] 1 K.B. 792.

[3] "The sources from which International law are derived include treaties, State papers, municipal Acts of Parliament and the decisions of municipal courts, and last but not least the opinions of jurisconsults and text-book writers." *In re Piracy Jure Gentium* [1934] A.C. at page 588. The "Dualism" of Triepel and Anzilotti finds no support in this statement.

the importance of this body of case-law is very great. Many valuable and carefully reasoned judgments which might otherwise have been lost to students of the subject are preserved, and no diligent writer on any topic of international law would consider his study complete without consulting these volumes. The volumes do not present a *jurisprudence constante*. From the nature of things that could not be expected as there exists no common judicial system or appellate jurisdiction which could alone be the standard of uniformity. Moreover, in matters of international law the decisions of the national courts of a single country are often difficult to reconcile or even plainly in conflict.[1] Although municipal decisions have undoubtedly contributed to the formation of customary international law, we must suspend judgment on the value of that contribution as it seems too early to assert that these decisions have become generally recognized as a manifestation of the practice of States. Even conceding all this, the richness of the material available in these volumes is undeniable. The following are examples of some of the general aspects of international law on which the successive volumes of the *Digest* have shed interesting light.

The continuity of the State or the principle, which is generally accepted in the doctrine of international law, that the identity of the State remains notwithstanding internal revolutions, changes of government or of forms of government, has received recognition in the decisions of the municipal courts of several countries; and so far as cases reported in the *Annual Digest* are concerned, appears to have been denied in none. Attention is drawn in the volume for 1941–2 to the English cases of *Government of Spain* v. *The Chancery Lane Safe Deposit Ltd.* and *State of Spain* v. *The Same Parties*,[2] and although the principle is not elaborated, the formal distinction between a State and its organs in the sense accepted by doctrine is recognized. In earlier volumes of the *Digest* the acceptance of this proposition is seen to be generally uniform, and the decisions illustrate in a very instructive manner its application to different facts.[3] It is satisfactory that these decisions are generally in line with the rule adopted in the Costa Rica arbitration of 1923 which is the leading international precedent on this point.[4]

The Principle that Validity or Legality of the Official Acts of a Foreign State cannot be Questioned in the Courts of Another Sovereign State. This principle is said to be a consequence of the doctrine of the legal equality of States.[5] But it is too soon to say that it is recognized by municipal courts as a rule of public international law. It is illustrated, however, in the tenth volume of the *Digest* by the judgments of the New York Supreme Court and the New York Court of Appeals in the case of *Anderson* v. *N. V. Transandine Handelmaatschappij*.[6] In that case the court had to consider the effect of a decree issued by the Netherlands Government in London, on 24 May 1940, vesting title to claims belonging to persons domiciled in

[1] See, for example, Cases No. 60 and 62 reported in *A.D.* 1941–2. These two cases were decided by two different branches of the same court (Superior Court of Zürich) but in the first it was held that there is no constant practice of the courts in Switzerland which prohibits attachments against foreign States and that process under Swiss law could be served on a foreign government through diplomatic channels. In the second case it was held that attachment of the property of foreign States was only permissible if the claim arises out of transactions of a private law nature and if the place of performance is in Switzerland.

[2] *A.D.* 1941–2, Case No. 7.

[3] *A.D.* 1919–23, Cases No. 14 and 15. These were American cases in which the court said: "It is of no consequence that Russia internally has been undergoing a political change. The primary consideration is that she has not thereby ceased to exist internationally as a State". In the same volume (Cases No. 16 and 17) the principle is applied (it is believed on the facts erroneously) by the Polish courts. Instances of the judicial application of this principle in other volumes are *A.D.* 1923–4 (Egypt), Cases No. 7 and 23; *A.D.* 1925–6 (Netherlands), Case No. 26; *A.D.* 1931–2 (Netherlands), Cases No. 16, 17, 18; *A.D.* 1938–40 (Italy), Case No. 13.

[4] *A.D.* 1923–4, Case No. 15.

[5] Oppenheim, *International Law* (5th ed., 1937), vol. I, p. 224.

[6] *A.D.* 1941–2, Case No. 4.

the Netherlands in the "Royal Netherlands Government temporarily resident in London and exercising its function there". The court took the view that American courts have generally held "that as between the recognized foreign government and its own nationals we should give effect to the title of the expropriating government". The court also held that the statement of the Netherlands Government that the decree was legally valid and binding was conclusive in American courts as to the law of the Netherlands. Another important case, decided by the English High Court (*In re Amand No.*1),[1] gave effect in England to a decree of the Netherlands Government in exile regarding military service but held that proof of the decree as a foreign law was required. The precise application of this principle, as yet in an embryonic stage so far as case-law is concerned, may be subject to various qualifications. Other factors may come in, such as the exterritorial effect of such decrees, their confiscatory character, public order, etc. On such points there is admittedly a divergence of opinion. But in the earlier volumes of the *Annual Digest* the principle may be perceived notwithstanding the extremely difficult questions which arise regarding its application.[2]

Diplomatic Immunities. In a valuable judgment, given on a reference of certain questions by the Governor-General to the Supreme Court of Canada, the court expounded its view of the immunity of a diplomatic envoy from personal taxation.[3] They distinguished between taxes "which constitute payment for services rendered for the beneficial enjoyment of the particular property in respect of which they are assessed" (e.g. water rates), and taxes strictly so-called, which "are imposed by the authorities of the State". They held that property belonging to a foreign government occupied by its accredited representative cannot be assessed and taxed for State or municipal purposes (using the word "municipal" in the sense of local government). This appears to agree with a decision of the French Conseil d'Etat in 1930, but that court drew a broader distinction, namely, between taxes directly connected with diplomatic activities and those not so connected.[4] The Highest Administrative Court of Hungary held in 1924 that foreign diplomats were not exempt from "luxury tax", but this appears to have been a form of indirect taxation.[5] There is no case in the earlier volumes of the *Annual Digest* bearing on precisely the same point as that raised before the Canadian Supreme Court. It was stated in that case by Duff C.J. (who had the advantage of reading a memorandum by M. Caillaux on the French practice): "The rule followed in France in relation to the property of foreign States occupied by diplomatic agents accredited to the French Government for diplomatic purposes (as stated in the memorandum of M. Caillaux) is that such property is exempt from land-tax levied by the general government as well as from departmental and communal taxes in respect of such property". Taschereau J. said: "I have come to the conclusion that practically in all the leading countries of the world it is a settled and accepted rule of international law that property belonging to a foreign government occupied by its accredited representative cannot be assessed and taxed for State or municipal purposes".

[1] *A.D.* 1941–2, Case No. 28.

[2] *A.D.* 1919–22 (England), Case No. 26; *ibid.* (Austria), case No. 31. The District Court of Amsterdam in 1925 applied this principle to official acts committed by the British Forces in Constantinople as an Occupying Power after the war of 1914–18: *A.D.* 1925–6, Case No. 19. But this view was disapproved by the Court of Appeal, Amsterdam, in 1928 and that court limited the application of the principle to cases where the Power concerned was a party to a suit before the court, *A.D.* 1927–8, Case No. 17. See, however, a decision of the Court of Rotterdam, *A.D.* 1938–40, Case No. 12, and a note in *A.D.* 1935–7, p. 201, regarding the practice of the Dutch courts. The Belgian courts accepted and applied the doctrine in cases reported in *A.D.* 1935–7, Case No. 94; *A.D.* 1938–40, Case No. 11. See also the French courts, *A.D.* 1935–7, Case No. 71; *A.D.* 1938–40, Cases No. 54 and 55. Rather obscurely, the Italian Court of Cassation in 1939 appears to have accepted the principle, *ibid.* Case No. 56.

[3] *A.D.* 1941–2, Case 106. [4] *A.D.* 1929–30, Case No. 191. [5] *A.D.* 1923–4, Case No. 171.

The 1941–42 volume contains a number of other cases bearing on the question of the personal immunity of diplomatic envoys. An Italian tribunal discussed the question whether the immunity extends to nationals of the receiving State appointed as envoys to it (Case No. 108). An American and also an English decision touch upon the duration of the immunity after the termination of the mission (Cases No. 107 and 110). The Court of Rome has held that the fact that a diplomat sued in an Italian court did not imply a submission to the jurisdiction in respect of a counter-claim in the same proceedings (Case No. 111). In the same case the court followed a decision of the Italian Court of Cassation in 1940 reversing the doctrine, followed by the Italian courts during the preceding thirty years, that immunity does not extend to acts of a private law nature.[1] This point is only one aspect of the immunities of States on which municipal courts have expressed divergent opinions. In this connection, a very interesting judgment delivered by a court in the Argentine must be mentioned, in which it was held that the immunity of a foreign State from taxation does not apply to surtax in respect of a legacy to a foreign government, such surtax being due under a law imposing it on beneficiaries domiciled outside Argentina (case No. 52). There is a crop of decisions of the courts of the United States reported under the same section of this volume, from which, however, no general principle can be discovered, beyond the rule that the declaration of the executive that immunity should be granted, is conclusive in the American courts.[2] It appears from these cases, following *The Navemar*,[3] that where a claim to immunity is made by a foreign government and is recognized by the United States Department of State, the courts will not pursue the question any further. It is only where (as in the case of *The Navemar*) the executive declines to take any action on the claim, that the courts assume jurisdiction to inquire into the existence of the immunity as a matter of law. In the result, it seems that American cases on immunity must be read with some caution from the standpoint of international law. Indeed, it appears from a decision of the New York Supreme Court in 1942[4] that, in the view of that court, immunity does not rest on international law at all. The court said; "From these cases it would appear that as viewed by the courts of this State, the rule forbidding suits against a foreign sovereign without his consent does not rest on comity but is applied because such suits involve claims of a political nature, which are not entrusted to the municipal courts. Based on the reasoning that immunity from suit is not a matter of comity, our courts hold that lack of diplomatic recognition does not affect the immunity. We see no difference in principle between a case where recognition is lacking and a case where we are at war with the sovereign. The latter case merely affords greater reason for refusing to exercise comity".[5] In this case, *Telkes* v. *Hungarian National Museum* (No. II), the State Department made no suggestion to the court concerning the claim to immunity involved, i.e. the claim of the Swedish Consul-General in charge of Hungarian interests, that the Hungarian National Museum was immune from suit on the ground that it was an agency or instrumentality of the Kingdom of Hungary, with whom the United States was at war. It was held, for the reasons quoted above, that, notwithstanding the existence of a state of war, if it was proved as a fact that the institution in question was an agency of the Hungarian State, it was immune from suit.

The immunity from process of State-owned trading vessels. This subject is controversial, involving as it does the whole issue of State immunity in modern conditions where the State has directly intervened in economic life and embarked on State trade. The proposition is laid down by Hanna J. (Eire) in 1941 in the case of *The Ramava*[6] that there is now no rule or usage of international law granting

[1] *A.D.* 1938–40, Case No. 164.
[2] *A.D.*, Cases No. 50, 51, 53, 54, 55, 56, 57, 58.
[3] *A.D.* 1938–40, Case No. 68.
[4] *A.D.* 1941–2, Case No. 169.
[5] *Ibid.*, p. 579.
[6] *A.D.* 1941–2, Case No. 20.

immunity from process to State-owned trading vessels. A different line has been taken in a number of decisions by municipal courts in the United States,[1] England,[2] and Canada,[3] which are reported in earlier volumes of the *Annual Digest*. However, judicial opinion in several countries inclines to support the views expressed by Hanna J. The Supreme Court of Sweden, in *The Rigmor*,[4] appears to accept these views. In the House of Lords in 1938 opinion was divided on this question, and some of Their Lordships reserved their final opinion on the soundness of the rule laid down in 1920 by the English Court of Appeal in *The Porto Alexandre*.[5] The German Supreme Court has twice indicated its agreement with the proposition that there is no immunity from local jurisdiction in cases of action *in rem* against vessels which, though not the property of a foreign State, are under charter to and employed by a foreign State for public purposes.[6] The emergence of a rule of customary law on this subject is likely to be too gradual for practical purposes, and a general convention (such as the Brussels Convention of 1926) is probably the most satisfactory solution of the question of principle.

Some such process of analysis as the above could be extended until the whole corpus of case-law comprised in these volumes was systematically classified. Possibly it is too early to embark on such a task, and, in any event, it would have to be done in such a manner that undue weight was not attached to cases which may not even embody the final conclusions on the topic involved of the courts of the countries concerned. It is undesirable, even if it were possible, that the English doctrines of *ratio decidendi* and *obiter dicta*, or any particular national method of treating case-law, should be applied to this material, which is, after all, no more than *one* element in the painful formation of customary international law. At the same time, the material becomes more intractable with the appearance of each new volume, and something like a *Digest of International Case Law* will soon be required. Already four volumes have appeared since 1939, covering altogether the years 1933–42, and of these volumes it has only been possible to give a brief notice here about the contents of the 1941–2 volume. Other decisions in that volume which merit study are a judgment of the Swiss Federal Tribunal regarding jurisdictional acts of a foreign State within national territory (Case No. 2), a decision of the English High Court containing observations on the effect of secession on nationality (case No. 8), a decision of the Supreme Court of Ceylon on the status of the Indian States in international law (Case No. 10), and several other cases on the position of saboteurs under the laws of war (Case No.168), salvage claims in Prize (Case No. 175), and the jurisdiction of States over foreign merchantmen in their courts (Case No. 40). There is a heavy preponderance of American cases in this volume, but the balance is to be redressed by a supplementary volume containing reports of cases which war conditions have made it impossible to obtain from a number of countries (including France). There is only one case decided by an international arbitral tribunal (Case No. 133).

There is no doubt that the venture embarked upon in 1929 will prove a powerful influence in the international law of this century, an influence that should rescue the subject from the realm of individual opinion in which it has too long remained and place it on a firm basis of judicial exposition. The Editor is to be congratulated

[1] *A.D.* 1925–6, Case No. 135; *A.D.* 1923–4, Case No. 73.
[2] *A.D.* 1919–22, Cases No. 100 and 101.
[3] *A.D.* 1919–22, Case No 106.
[4] *A.D.* 1941–2, Case No. 63, but it should be noted that this case turns largely on the interpretation of Swedish legislation.
[5] See *The Cristina*, *A.D.* 1938–40, Case No. 86.
[6] *A.D.* 1919–22, Case No. 102 (*The Ice King*); *A.D.* 1938–40, Case No. 94. The distinction between public and private purposes for which the vessels are being used, has also been accepted by the Mixed Courts in Egypt, *A.D.* 1919–22, Case No. 107; *A.D.* 1923–4, Case No. 77, and also in Holland, *A.D.* 1919–22, Case No. 8.

on the successful transformation of the *Digest* into Reports in the usual sense (this change of policy having been adopted in the 1933–4 volume), on the publication of four volumes of the *Digest* in war-time, covering the years 1933–42, and on the success with which he has continued, under difficult conditions, to carry out the tasks of editorship. The Advisory Committee, and especially Sir Arnold McNair and Sir John Fischer Williams, who share with the editor the pride of starting this enterprise, may well be proud of the appearance of the tenth volume of this Series.

J. Mervyn Jones.

The Outlook for International Law. By J. L. Brierly. Oxford University Press. 1944. 142 pp. (6*s*.)

With the coming of the League of Nations and the signing of the Kellogg Pact it was too readily assumed that the international community had at last been brought under the rule of International Law, and that all that remained to be done was to perfect and elaborate its contents. When it became clear that the law was impotent to restrain the law-breakers there arose a tendency to go to the other extreme and to say that International Law served no useful purpose, and even to doubt its existence. During the whole of this period Professor Brierly has been conspicuous for an attitude which has been both constructive and realistic. While striving to make the system a more effective instrument, he has never minimized its shortcomings or exaggerated its authority. No one therefore could be better qualified to discuss its prospects at this crucial stage in its history.

The core of Professor Brierly's thesis is that International Law can function only in a world where peace and order have been established, and he warns us that the notion that International Law itself can create the conditions necessary for it to be effective is profoundly mistaken. These conditions can be brought about only by the effective co-operation of States for the maintenance of peace and the promotion of their common welfare. There is much in common between this attitude and that expressed by Professor Carr in his *Twenty Years' Crisis*, for they both consider that the shortcomings of International Law are due to the embryonic character of the international community rather than to any technical defects in the system itself; but while insisting that law cannot create order in the international any more than in the national sphere, Professor Brierly fully recognizes that it has an important contribution to make towards the maintenance of that order when once it has been firmly established, for, as Machiavelli observed, communities must be founded on good laws as well as on good arms.

Hitherto the rule of law in international affairs has been limited by the fact that States have been unwilling to allow it to have the final word in issues affecting their vital interests. The outlook for International Law therefore depends on the extent to which effective measures can be taken to regulate the use by states of armed force, and this in turn depends on finding means other than war for satisfying their vital interests in so far as they can be shown to be reasonable. Professor Brierly's conclusions on these matters had been formulated before either the Dumbarton Oaks proposals or the Charter of the United Nations had appeared, and their realism will be seen when they are re-examined in the light of the provisions agreed upon at San Francisco.

In dealing with the problem of Collective Security, Professor Brierly reminds us that much of the tragedy of the League of Nations arose from the fact that the members accepted commitments which when the time came they were unable or unwilling to perform. His warning against repeating that fatal mistake is necessary and timely, but in considering the limits within which constitutional governments can safely accept such commitments, the duty which rests upon those govern-

ments to enlighten their people as to why these obligations are necessary and what they involve is a factor which should also be taken into account. In any case, scientific developments which have been revealed even since these chapters were written must have gone a long way towards removing any difficulties which governments might previously have had in persuading their people that the maintenance of peace by effective concerted measures is a responsibility which can no longer be shirked. No system of collective security will work unless means can be found to remove the genuine grievances of states, but to suppose that such situations can always be successfully dealt with by any purely legal approach Professor Brierly shows to be fallacious, for often the solution must be sought along political rather than legal lines. The flexibility of method, which is the outstanding feature of the provisions of the Charter of the United Nations relating to the pacific settlement of disputes, shows that this is the only practical approach to the problem.

Efforts to attain collective security and to bring about the settlement of disputes by pacific means have little chance of success unless accompanied by positive measures to further the economic and social well-being of the world as a whole, but, as Pofessor Brierly declared in his *Law of Nations* and as he again points out in this volume, one of the greatest defects of International Law has been the smallness of its range in that economic and social questions usually fall exclusively within the domestic jurisdiction of States, who are free to pursue whatever policies they please in these matters without regard to their effect upon the rest of the world. "The fact is", he says, "that international law is still very definitely in the *laisser-faire* stage of social development". Fortunately, the prominent place which the Economic and Social Council is given in the United Nations organization shows that it is being increasingly appreciated, as Professor Brierly has always realized, that without adequate international co-operation in matters affecting the welfare of the world in general, International Law will remain a broken reed.

D. J. LL. Davies.

The American Senate and World Peace. By Kenneth Colegrove. New York: Vanguard Press. 1944. 209 pp. ($2.)

The Constitution of the United States provides that the President shall have power to make treaties "by and with the advice and consent of the Senate two-thirds of the Senators present concurring". If it were impossible for the President to make international agreements except in this form, the position would be manifestly inconvenient. In fact, American practice recognizes another form, called "executive agreements", which enables the President to make such agreements without submitting them to the Senate. However, it is not the inconvenience of the rule that is the subject of criticism in this book. There is a body of opinion in the United States that considers that the time has come to amend the Constitution on this point on the ground that the rule is bad in principle and undemocratic and unsatisfactory in practice because it has clearly worked against the power of the country to speak with authority and effect in international affairs, thus preventing the United States from exercising a decisive influence in preserving world peace. The author of this book, who is a Professor of Political Science at North Western University in Chicago, presents the case for these views and endeavours to ensure that they shall become as widely spread as possible. The action which he advocates is "a constitutional amendment to abolish the two-thirds rule and the monopoly of the Senate over the approval of treaties" (p. 142). He includes in his book a draft of an amendment which would permit approval of a treaty by a majority of the Senators and Representatives—in other words by a majority of the two Houses of Congress in Joint Session. This interesting thesis

is argued with great force and evident feeling so that no one can finish reading this book without being convinced that the existing method of treaty-making has been the cause of many evils. Whether the alternative he proposes is the right one is a matter for the American people to decide. This method of "Joint Resolution" has already been used to carry out certain international agreements, and Professor Colegrove prefers it to the device of executive agreements as an alternative to the normal treaty-making process. The method of "Joint Resolution" has met with criticism in the Senate and, it would seem, also outside the Senate.

Public opinion in Europe has good cause to be uneasy regarding the power of the Senate in foreign affairs, as it recalls the defeat of the Treaty of Versailles of 1919 and the consequent inability of the United States to participate as a member of the League of Nations. The author of this book points out how this defeat was substantially the result of the personal hostility of Senator Lodge towards President Wilson, and he gives other examples of cases where Senators have opposed Presidential foreign policy not on its merits but out of personal pique or hostility. Professor Colegrove has compiled (no doubt for the guidance of the American electorate) a black list of forty-five Senators whose record indicates a hostility to the purposes of the United Nations. A slightly extravagant impression is created by the title of Chapter III "Every Senator wants to be a President", but we see the point which is indeed of great importance not merely to the United States but to the whole world: the point is that it lies within the power of a small minority to defeat the hopes and wishes of an entire nation towards a stable and enduring peace settlement. The evidence which the author accumulates of the possible abuse of power by such minority is alarming, and the lesson cannot be driven home too much.

Among the interesting features of the book from the standpoint of a foreign observer is the author's description of the work and methods of the Senate Committee on Foreign Relations. His account of the constitutional law and practice of the United Kingdom in the matter of treaty-making must be read with some reserve.

J. M. J.

Treaties and Constitutional Law: Property Interferences and Due Process of Law. By Willard Bunce Cowles. American Council on Foreign Affairs, Washington. ix + 315 pp. ($4.50.)

This book deals with problems of American Constitutional Law, but every international lawyer should be aware of it, and some should read it. The author states his basic problem to be "whether or not the due process and just compensation clauses of the Fifth Amendment of the Constitution of the United States are applicable to, and constitute limitations upon, the provisions of the international treaties of the United States, in their character as domestic law in the United States".

It would be very rash and somewhat impertinent for one who is not an American lawyer to attempt to assess the soundness of the author's conclusions. But I am justified in bearing witness to the lucidity of his exposition and the cogency of his argument. His analysis of the case-law is impressive, and I shall be surprised if the volume does not establish itself in the United States as a work of high authority. Any non-American international lawyer who may be interested in treaties will find much that concerns him here. At least two chapters have a more general interest, VIII "The Dred Scott Case", and XIV "The Fifth Amendment and the Litvinoff Assignment".

Arnold D. McNair.

Prisoners of War, A Study in the Development of International Law. By William E. S. Flory. With an Introduction by Norman H. Davis. Washington D.C.: American Council on Public Affairs. 1942. 179 pp. (Cloth edition $3.25; paper edition $2.75.)

There is a serious lack of good treatises in the English language on the law relating to prisoners of war. Dr. Flory has had the excellent idea of compiling such a treatise, drawing very largely for his material on the practice of States as expressed in governmental policies and regulations. He has set two important limits to the scope of his study: he has not attempted to investigate the treatment actually accorded to prisoners; and he has not taken into account (except in occasional passing references) the experience of the Second World War.

Dr. Flory has collected an impressive amount of material, particularly from the American Revolutionary and Civil Wars, but he might with advantage have been more courageous in assessing the relative worth of the many precedents he cites. He is a little inclined to be content with amassing under each heading a vast store of precedents and instances, leaving unanswered, or only partially answered, the all-important question of what conclusions are to be drawn from them. A reader who wants to know what the law is, will often be disappointed; what he will find, and that in abundance, is material for further study. Dr. Flory seems also to have been over-anxious to include all his material, whether or not it is strictly relevant to the argument: for example, the information about concubines in China during the Chou dynasty (p. 13) is no doubt very interesting, but it is startling, not to say confusing, to find it in a chapter headed "Concepts of International Law".

Even so the book might have been a very interesting one had it not been made tedious by pompous circumlocution. To take a few examples selected at random: instead of saying that at the end of a war prisoners are usually released, the author says "the termination of a war has come to mark a general termination of military prisonership" (p. 110); on page 127, a prisoner does not give a parole that he will not fight again, he gives a parole "to the effect" that he will not fight again; on page 140, personal details become "details of a personal nature"; on page 142, obligations to the State become "obligations with respect to the State"; on page 147, punitive orders become "orders that are punitive in nature"; and so on. Almost every other sentence has this pernicious kind of writing, but it reaches its climax in the last chapter, which has the alarming title of "Dynamics of the Law" but proves on investigation to be none other than our old friend "conclusions". Here indeed Dr. Flory rides his jargon on the snaffle, arousing our curiosity if not our understanding with such statements as this: "The general principles seem to have encouraged a loose integration of the various other rules, but even here, it cannot be said that the appearance and transformation in single rules have been contemporaneous with the appearance and transformation in theories of prisonership since no theory or theories of prisonership proper have been generally accepted" (p. 159).

In short, Dr. Flory has put an immense amount of work into this book, his learning is unimpeachable, and it will be a useful source of precedents ancient and modern; but it would be improved out of all recognition if Dr. Flory would go through it with a blue pencil and reduce it to about a hundred pages of clear, straightforward English.

There is a valuable selected bibliography of sources.

R. Y. Jennings.

The International Responsibility of States for Denial of Justice. By Dr. Alwyn V. Freeman. 1938. Longmans. xix + 758 pp. (36*s.* net.)[1]

In this volume the author examines with great thoroughness the subject of Denial of Justice as a ground for the responsibility of States in international law. An exhaustive treatise was required. Though the subject has received attention in studies contributed to periodicals and in lectures delivered before the Academy of International Law at The Hague, a study of the subject in book form has hitherto been lacking.

Few terms are used habitually in the day-to-day practice of international law in such widely different senses as denial of justice. The author enumerates (p. 96) no less than six categories of meanings in which the phrase is used by publicists. To add to the difficulty, the subject of denial of justice raises passionate feelings in some quarters, due to the sentiments provoked by bitter experiences in the past in Latin American States. The result is that the representatives of those States regard it as almost a point of honour to champion a definition of denial of justice which shall restrict it to the smallest possible dimensions, whilst in other quarters political interests, the precedents drawn from claims arbitrations and the conclusions reached by teachers and scientific bodies, justify support for a much more extensive interpretation. The author is a whole-hearted champion of giving to the term a scope sufficiently large to cover every case in which there has been a failure by the State to comply with its duty of providing aliens with a judicial protection for their rights which shall be adequate not only in organization but in actual operation (p. 146). Thereby admittedly he attributes to the term a meaning wider than it bears in municipal law. There is the further disadvantage that it gives to "denial of justice" a sense other than what the natural meaning of the words suggests, and so converts it into a term of art instead of a simple phrase.

Part I of the work deals with the principles applicable to Denial of Justice as a subject, including the question of State responsibility in general, international responsibility for acts of the judiciary, the cases where international illegalities on the part of the judiciary should or should not be regarded as denials of justice, the history and origin of the conception, and the sense in which in the author's view the phrase ought to be used. Part II deals with the various circumstances out of which claims for denial of justice have arisen or may arise, as exemplified in the records of the decisions of the numerous commissions which have adjudicated on claims of this character. Part III deals with the conditions of international liability, of the need for exhausting local remedies, of the attempts to exclude diplomatic claims by the insertion of a "Calvo clause" and similar stipulations, and of the interpretation and effect of such clauses, and also of the international standard to which it is now beginning to be agreed that States must conform in their treatment of aliens. The final chapter deals with the measure of reparation in cases where a decision is pronounced to the effect that a denial of justice has occurred.

The labour which Dr. Freeman must have given to the preparation of this volume is immense, and his reward will be found in the publication of a work which will be invaluable to legal practitioners who are concerned with the presentation of such claims in future before judicial tribunals as well as to the teachers of international law. The material on which an opinion or a decision must be based is collected by the author in a pleasant and readable form. That the views which he himself enumerates will meet with assured acceptance is more open to doubt.

[1] This review, and a number of other reviews printed in this volume, were prepared before the War for inclusion in the volume for 1940. They were not accessible till recently. It is believed that the importance of the work justifies the inclusion of this review in the present volume.

The subject is one which is replete with difficulty. Authoritative guidance in decisions of tribunals such as the Permanent Court of International Justice is lacking and the experiences of 1930 show that international agreement as to the basis of liability is not to be expected. For the very reason that the subject is so full of difficulty a warm welcome should be given to Dr. Freeman's volume.

C.

International Law and American Treatment of Alien Enemy Property. By James A. Gathings, Ph.D. With an Introduction by Professor Edwin Borchard. American Council on Public Affairs, Washington D.C. 1940. xiv+143 pp. ($2.50.)

In this book, published before the United States entered the war in 1941, Dr. Gathings accepts the thesis that at the outbreak of the war of 1914-18 there existed a rule of international law according to which private property owned by an enemy and situate within a belligerent country was inviolable and protected against confiscation and even against sequestration and seizure. After a survey of the treatment of enemy property in Europe during and after the last war, the author reviews in detail the American policy during the same period. The author agrees with the comment in Professor Borchard's Introduction that in the result the United States has "become afflicted with a policy so contrary to international law". The author admits that when, between 1914 and 1918, several States took control of enemy property, they "did measure up to the requirement that private property might not be confiscated during war", but, he says, the policy of selling and liquidating private property did not measure up to that requirement (pp. 112–113). He regrets that the Treaty of Peace set up two standards of conduct, one for the vanquished and another for the victors. That the defeated Powers accepted the treaty and promised compensation to their nationals in respect of property retained by the victors, affords "a strong legal argument" for the latter's policy. Yet the author concludes that "the practical side of the situation presents another picture. The economic events in Germany after the ratification of the Treaty of Versailles and after the invasion of the Ruhr caused Germany to repay many of these claims with paper money which meant actual confiscation". Dr. Gathings admits, however, that the absolute inviolability of enemy property would be impracticable, and he suggests a modification of what he considers to be the traditional rule by permitting sequestration provided that at the end of the war the property should be returned to its owner, that damages for sequestration should be paid and that, apparently even during the war, the owner should have access to the courts in order to enforce the modified rule of international law.

Problems of enemy property during the Second World War are also discussed by Dr. Domke in Number 1 of Volume XI of *Law and Contemporary Problems*, a quarterly published by the Duke University School of Law, Durham N.C., with reference to control over enemy property in the Western Hemisphere.

F. A. Mann.

The Expropriation of Foreign-Owned Property in Mexico. By Wendell C. Gordon. Published by the American Council on Public Affairs. Copyright 1941 by W. C. Gordon. viii+201 pp. (Cloth $3.25, paper $2.50.)

"The American Council on Public Affairs is designed to promote the spread of *authoritative facts and significant opinions* concerning contemporary social and economic problems . . . it is not, however, committed to these facts or opinions in any way."

This volume produced by the Council is of permanent interest for its useful and

comprehensive collection of facts about the Oil, Land and Railway expropriations carried out by various Mexican governments. Some of the opinions expressed by the author about international law will give rise to controversy, for instance the rather favourable interpretation of the "Calvo" clause (p. 167), and the somewhat pragmatic views of international law which he expounds.

At. p. 135, the author says: "on the whole it would seem that Mexico should not be allowed to take the oil properties without the payment of compensation because of the merits of the question itself, because of the effect upon Latin America as a whole, and *because it would be a further blow to international law*". But does the failure to obey a rule affect the existence of the rule itself?

The United States Note to Mexico of the 22nd August 1938 said: "There is indeed no mystery about international law. It is nothing more than the recognition between nations of the rules of right and fair dealing. . . ." Surely failure to observe any rule of fair dealing is a blow to the *observance* of international law, not a blow to the law itself?

Dr. Gordon concludes his essay, however, in more positive terms when he says (p. 177): "International law cannot be controlled by constitutional law, and international law prohibits the confiscation of the property of foreigners unless compensation is paid". On the other hand, at p. 156, he states; "Nor is there in international law an obligation that the decisions of a country's courts be intrinsically just. At least such is the theory. . . ." Now if the test of international legality is a rule of right doing, which is even above constitutional law, it is difficult to see how there can be any right and lawful claim to compensation in international law unless that claim be based on a plea of injustice or denial of justice. The British Government appealed to a general conception of international law when (Cmd. 5758/38) it claimed a *fair* payment for the properties of its nationals expropriated by Mexico. As the United States Government said in its Note (U.S. Dept. of State press release in 1938 on this subject), "Nor can we admit that any government unilaterally and through its municipal legislation can, as in this instant case, nullify this universally accepted principle of international law [requiring compensation], based as it is on reason, equity and justice".

Is not this really the crux? Is not the claim to compensation for fairly acquired rights based on an elementary conception of justice?

Admittedly English courts will not interfere with the *possession* of a sovereign so long as that possession is maintained by him; the cases involving Russian and Spanish assets, decided during the last twenty or thirty years, show this. But are we to conclude that possession of a sovereign is the same as ownership? Can national law, constitutional or otherwise, give anything more than a *national title* and the *presumption* of an international title? And is not this presumption of an internationally valid title rebuttable if it can be proved to have been obtained in contradiction of the principles of that international law upon which the claimant bases an internationally valid title? A foreign judgment, obtained by fraud, may in the interests of justice be set aside in an English court.

The reviewer sees no reason for attributing to a sovereign any power to affect titles of things outside his possession, except in the sense that such a sovereign is presumed to act in accordance with international law. A sovereign in possession is one thing: a sovereign purporting to grant an international title to a thing to be valid when taken out of his jurisdiction, is another. To create an international title a sovereign must rely on international law, and if he relies on international law he must accept its conditions.

The fact that a sovereign does not give compensation for property taken may not affect his, or his assignee's, title under the law of that sovereign: but if the owner of the property cannot obtain compensation, it seems not unreasonable that some foreign courts allow the owner to attach his chattel in the foreign country to

which the chattel is brought, and thus, by the exercise of a right *in rem*, compensate himself in respect of a disregarded claim *in personam*, which, though recognized in international law, he cannot enforce directly against a sovereign or a sovereign's possession.

There seems to be no convincing reason why those who obtain goods as a result of confiscations, e.g. as in the case of bonds and goods taken as a result of the German anti-semitic laws at "upset" prices, be allowed to presume an implied "covenant for quiet enjoyment" all the world over.

The fact that some Continental courts have been bold enough to inquire into the antecedents of an assignee from an expropriating government, in itself shows that a title by the *lex loci* is not necessarily a universal title.

It will be interesting to see if the House of Lords will consider themselves bound, without qualification, by the decision in *Princess Olga Paley* v. *Weisz*, [1929] 1 K.B. 718, in the inevitable claims for restitution which, shortly we hope, will be made against Germany, and assignees from Germans, by those rightful owners who have been dispossessed of their lawful treasure by the Nazis.

The litigation in Europe over the expropriated Mexican oil did, as Dr. Gordon points out, appear to favour the Mexican Government and its assignees. But the war came to complicate matters, and the final word cannot, we suggest, be said to have been spoken yet. There were, for instance, cases decided in Rotterdam in 1938 and 1939 against the title of such assignees, as well as the cases in favour of Mexico and her assignees, reviewed at pp. 126 and 127 of Dr. Gordon's book. Whether rights of property are regarded as depending on a concession from the State, or whether they are, as at common law, merely regarded as rights which are "proper" to human beings, as *persons*, those rights are limited, and not absolute. If it be argued that they depend on concession from a State, then they can presumably only extend throughout the jurisdiction of that State and be accepted elsewhere by courtesy: if they depend on the fact that property rights are proper to man, as man, then the State's right of interference is equally limited by the extent of its power. Has not the time come to admit boldly that a title given by a State's expropriating without compensation is only *presumptively* of international validity, whatever it purports to be under that State's own national law? Does it pay to do business with Hitler? In this connexion the cases reported in this book must not be regarded as final.

B. A. Wortley.

Transactions of the Grotius Society. Volume 29. 1944. London: Longmans, Green & Co. Ltd. xxiv+170 pp. (15*s*.)

This volume includes seven papers read before the Grotius Society in the year 1943.

For the public international lawyer the most important contribution is Professor Lauterpacht's paper on "The Law of Nations, the Law of Nature, and the Rights of Man", an examination of the doctrine of the rights of man with particular reference to the relationship of the individual and the State. Looking first at the history of the doctrine, Professor Lauterpacht finds a significant continuity extending from antiquity to the present time. Turning then to the objection that natural rights depend ultimately on the sanction of the State, he finds an alternative sanction in the "twin operation of the law of nature and the law of nations—both conceived as a power superior to the supreme power of the State". There follows a brilliant dialectical triple fugue based on the themes of international law, the law of nature, and the rights of man. Finally, Professor Lauterpacht urges that the rights of man be assured by an "International Bill of the Rights of Man—conceived not as a declaration of principles, but as part of positive law, as part of the constitutional law both of States and of the society of States at large".

In an amiable discourse on "The Future Development of International Law", Mr. F. N. Keen sketches in broadest outline the kind of international régime he would like to see established. It is a stimulating résumé of the requirements for a developed international government, but Mr. Keen's proposals are sometimes a little divorced from political realities: for example, his suggestion for basing voting power on population looks well enough in the abstract, but a reference to *Whitaker* shows that it would give the Dominion of Australia one vote against China's four hundred and eighty-three!

All international lawyers should read Sir Arnold McNair's paper on "The Need for Wider Teaching of International Law", in which he emphasizes that wise teaching of the fundamental principles of international law to a wider public can actually strengthen the law; just as Dicey's brilliant teaching of constitutional law created a respect for the constitution which has enabled it to withstand many attacks. Sir Arnold's summary of the position of international law, both public and private, in the syllabuses of the law schools of this country shows that there is certainly no room for complacency.

Two articles deal with special branches of public international law. Dr. Ernst Wolff tackles the very difficult question of "Municipal Courts of Justice in Enemy-Occupied Territory", his main point being that the legality or illegality of the occupation has no bearing on the question of the powers of the occupying Power. Dr. F. A. Mann writes on "Judiciary and Executive in Foreign Affairs"; a survey of the relationship of the courts and the executive in cases touching foreign policy, dealing particularly with the question of how far the court must seek and be guided by the advice of the executive.

The two remaining papers are concerned primarily with the conflict of laws. Professor Gutteridge discusses "Comparative Law and Conflict of Laws", demonstrating the value of the comparative method in providing material both to fill the gaps and to remedy the defects of the rules of conflict. This paper, written with Professor Gutteridge's inimitable combination of learning and robust wisdom, includes a valuable critique of the methods and difficulties of proof of foreign law in English courts. Dr. K. Lipstein concludes his interesting examination (begun in *Transactions*, vol. 27) of "Conflict of Laws before International Tribunals". In claims based on a denial of justice affecting property rights, international tribunals have in the first place to determine whether a property right has been acquired and whether it is vested in the claimant. This question is determined by municipal law; and Dr. Lipstein's thesis is that international tribunals are gradually developing a system of international rules of conflict of laws to enable them to decide which municipal law applies.

R. Y. Jennings.

L'Organisation de la Société Internationale. By Paul Guggenheim. Editions de la Baconnière. Neuchâtel. 1944. 175 pp.

This is a collection of careful and scholarly essays on some of the principal problems of international organization. These include such questions as the problem of the international federation of the future; the limits of international organization; universalism, continentalism, and regionalism; the place of the great and of the small powers in international organization; the principles of unanimity and of majority; organization of public opinion in the international community; the Atlantic Charter in relation to traditional international law. The book ends with a short chapter on "Utopia, Reality, and Ideology in International Organization". Professor Guggenheim is not given to anything in the nature of revolutionary innovation in international organization. But he recognizes that unlimited sovereignty is inconsistent with the needs of modern international society. In the

result, he advocates a middle course. Yet many readers of this thoughtful volume will ask whether the author has not succumbed too readily to the temptations of a "sound and careful" approach to this central issue of international organization. There is, for instance, little substance in the criticism of the doctrine of sovereignty so long as we are content, as is Professor Guggenheim, with the principle of unanimity. The gap between the existing law in this, and similar, matters and a sensible ordering of international relations is too glaring and too paradoxical to admit of a consistent reliance on gradualness. There is, in the long run, little persuasive force in our criticism of sovereignty if we couple it with wise words of caution and insist that the development of international law is decisively determined by the fact that, after all, States are sovereign collective entities and very much unlike individuals. States are aggregates of individuals and their mutual relations will approximate to a moral and rational order in proportion as we have the courage to stress that fundamental fact rather than the aberrations and peculiarities of the collective nature of States.

H. L.

International Tribunals, Past and Future. By Manley O. Hudson. Carnegie Endowment for International Peace and Brookings Institution. Washington, D.C. 1944. xii+287 pp.

This is a book which deserves a warm welcome. There has been for some years a gap in the literature of international law which required to be filled: the need of a book which would describe in a convenient form the functions and work of international tribunals and the problems connected with them. The experience of Judge Hudson, as a teacher and scholar, as a man of affairs and a Judge of the Permanent Court of International Justice, greatly adds to the value of this work. It is divided under four headings. Part I is a brief introduction describing the general development of modern arbitration and judicial settlement since the Jay Treaty between the United States and Great Britain in 1794. Part II is entitled "General Problems of International Tribunals". From the point of view of the student of international law this Part is full of useful knowledge containing a general picture of the principles of jurisdiction and procedure which have been applied to international tribunals. An interesting chapter on the Manning of International Tribunals introduces the reader to the human and practical problems raised in finding suitable personnel to act as members of international tribunals. Part III discusses the problems of the future, the organization of the Permanent Court of International Justice, the desirability of special tribunals to deal with questions arising from international loans, commercial questions, administrative matters connected with international organizations, etc. Judge Hudson is of the opinion that the Permanent Court of Arbitration can still render useful service and should be retained. Part IV embodies certain general conclusions and reflections on the functions of international tribunals. Judge Hudson explains here the vexed questions of obligatory arbitration, of the proper sphere of international tribunals, and of justiciable and non-justiciable disputes. He points out the difference between the materials with which international tribunals have to deal and those used by municipal courts. This difficult and controversial field he traverses with impartiality and fairness to the various arguments involved. Although he is anxious to promote the pacific settlement of international disputes he warns us that "the proper functions of courts are quite limited, that they should not be asked to act outside the limitations of the judicial process, and that some of the needs of the community of States may have to be served by other agencies". He concludes: "No hard and fast lines can be drawn between law and politics, yet the two fields must be kept distinct" (pp. 252–3).

The purpose of this book is summed up by Judge Hudson as follows: "This

volume essays to present a survey of developments with respect to international tribunals over the period of one hundred and fifty years from 1794 to 1944" (p.250). This purpose is successfully executed with a succinctness of style and a breadth of description which make it particularly valuable not only to students, but also to a wider public interested in international affairs. It is important for all to realize that the purely literary approach to international law is obsolete, and that students of international law have to acquaint themselves with the work of international judges as well as with that of writers and jurists. It is not a text book on the law and procedure of international tribunals, nor a summary of the case-law built up by them; but it does help to banish the all-too-current idea that international law is merely a collection of pious hopes and disputable opinions. The book contains an excellent general bibliography with separate bibliographies for each chapter.

J. M. J.

Proceedings of the International Law Conference, London, 1944. *Transactions of the Grotius Society*. Vol. 30, Part I. London: Longmans, Green & Co. Ltd. 1944. 141 pp. (15*s*.)

This is a report of the proceedings of an international law conference held in London on 29 and 30 April 1944, organized by the Grotius Society and presided over by the President of the Society, Sir Cecil Hurst. It was a distinguished gathering, including representatives of many countries.

The first session was opened by Sir Arnold McNair with a paper on "The method whereby international law is made to prevail in municipal courts on an issue of international law". The paper is confined to an exposition of the attitude of English courts towards international law, the courts of other countries being left for discussion. Sir Arnold is a master of lucid exposition pointed by sly humour; the paper does not, however, break new ground and most of the topics have already had more detailed treatment by the author elsewhere. The discussion, though ably led by Professor Keeton, is a trifle disappointing. Foreign lawyers present were not slow to accept the invitation to describe the attitude of the courts in their respective countries, but although some useful information comes out by the way, they were for the most part speaking without the book and few were able to present a comprehensive picture complementary to Sir Arnold's description of the position in English law.

The second session started well with a learned and stimulating paper from Dr. Idelson on "The law of nations and the individual", and the main problems involved were pointed by Professor Lauterpacht who led the discussion. But the general discussion makes disappointing reading and leads to no conclusion other than a more or less general agreement that it is now respectable to hold that individuals are, or at any rate ought to be, subjects of international law.

At the third session Dr. Colombos read a paper with the resounding title "The shape of things to come, viz. the organization and functions of the future international authority". Though recent events have taken us some way past the speculations of early 1944, the paper is still a useful analysis of the pronouncements and declarations of governments and statesmen up to and including the Teheran declarations of 1 December 1943. Professor Goodhart, who led the discussion, had both feet firmly on the ground; but the temptation to indulge in rhetoric was too great during the general discussion, which may be summarized by saying that many admirable sentiments were expressed.

At the fourth session came the Presidential address on "The nature of international law and the reason why it is binding on States". The President is one of that small band of writers on law who possess a really good English style, and his

attempt "to deal in the simplest manner possible with the elements of the situation" is, after the general discussions, like the shadow of a great rock in a weary land.

The conference was brought to a close by an address from Lord Finlay, who deputized at very short notice for the Lord Chancellor.

This volume will no doubt be a pleasant record for those who were so fortunate as to be able to attend the conference; but judged as a contribution to the science of international law its value is slight.

R. Y. Jennings.

Digest of International Law. By Green Haywood Hackworth. Vol. I (1940), 803 pp. ($2); Vol. II (1941), 829 pp. ($1.75); Vol. III (1942), 820 pp. ($2); Vol. IV (1942), 949 pp. ($2.50); Vol. V (1943), 851 pp. ($2.50); Vol. VI (1943), 655 pp. ($1.50); Vol. VII (1943), 709 pp. ($1.75). General Index. Table of Cases (1944), 384 pp. ($1.50). United States. Government Printing Office, Washington, D.C.

This monumental work is a continuation of Moore's *Digest* and serves the same purpose. Its author and principal compiler, who, until his recent election as one of the Judges of the International Court of Justice, was the Legal Adviser of the Department of State of the United States, has placed all students of international law under a heavy obligation. He has not only given an authoritative and full account of the governmental and judicial practice of the United States; he has, in many respects, put it in perspective of the practice of other States as well as of decisions of international and municipal courts and of the literature of international law. For these volumes do not consist entirely of hitherto unpublished material abstracted from the files of the State Department. In many respects they resemble a general treatise of international law. But, in substance, this is a treatise of international law as applied by the United States. Together with the "Foreign Relations"—an annual Series of great value which puts before the student most of the diplomatic correspondence of that country—it provides an unparalleled source of information and a most important instrument of study. It must be a matter of regret that no similar record of the practice of other countries is as yet available. As it is, the treatment of various questions of international law in monographs and otherwise tends to be one-sided inasmuch as it is based largely on the practice of the United States. Until the Foreign Offices of Great Britain and France—and also of some of the smaller countries such as Belgium, Holland and Sweden—have followed the lead of the State Department in this matter we cannot hope for a more comprehensive and accurate treatment by writers of questions of international law than is the case at present. It is also clear that from the point of view of the requirements of the staffs of the Foreign Offices and of the diplomatic and consular representatives of the countries concerned, the encouragement of publications of this kind is desirable and, in the long run, highly economical. It would make unnecessary the compilation, amidst some haste, of special memoranda bearing on situations as they arise in particular cases. And there is no doubt that other Government Departments would greatly benefit from the existence of a semi-official publication of this nature.

Official publications such as the "Foreign Relations" Series or semi-official publications such as the *Digest* for which Mr. Hackworth has made himself responsible, must be the result, to a large extent, of the initiative and efforts of the personnel of Government Departments. In preparing the present work Mr. Hackworth was able to count on the devoted assistance, which he generously acknowledges, of a number of his staff; the publication as such was undertaken by the United States Government Printing Office. The reviewer had occasion to see parts of this work in its preparatory stages and to ascertain for himself the very exacting nature of Mr. Hackworth's labours which were by no means those of

supervision. But it is obvious that no work of that description can hope to succeed unless it has the active support of official quarters. There ought to be no cavil or reservation in acknowledging the debt which the entire profession of international law owes in this respect to the enlightened attitude of the State Department.

These volumes go very far in the direction of making available to the student the inter-departmental correspondence, including communications from the State Department to the diplomatic and consular representatives, and conversely. It is unlikely that any true interest of the United States is adversely affected by this publicity. The authorities of the State Department have apparently discarded the view that publication of international correspondence may be used against them as a precedent and that, in consequence, it ought to be kept secret as far as possible. The benefits accruing from the publication of the records outweigh decisively any such remote disadvantages. For these records show a significant degree of consistency, of adherence to principle, and of respect for international law in the daily intercourse both with powerful States and with weaker neighbours. They show also that precedent, unless embodied in a binding conventional or customary rule, is not a factor which limits the State's freedom of action. Circumstances change, and it is seldom that a situation resembles so closely a previous one as to make it difficult to adduce a good reason for departing from a practice formerly adopted in any particular matter.

The *Digest* covers the entire field of international law, and it is therefore unnecessary to survey its contents. The eighth volume is composed of Tables of Cases and a General Index. The latter covers 328 pages and is a model not only of completeness but also of a scholarly appreciation of the needs of the student and of the practitioner. It is clearly more than a product of mere clerical assembling of items. The entire cost of the eight volumes is less than £4.

H. Lauterpacht.

Constitutional Provisions Concerning Social and Economic Policy. Montreal: International Labour Office. 1944. 955 pp. (20*s*.)

This volume contains a collection of constitutional texts concerning social and economic provisions of nearly four hundred and fifty countries and governmental units, as well as certain international declarations of policy. The work is preceded by an Introduction which forms an excellent guide to the subject. It draws special attention to the provisions which occur with increasing uniformity in various constitutions, and it contains some useful advice with regard to the special considerations to be taken into account when drafting social and economic provisions in a constitution. There is also a general bibliography of collections of constitutional documents, treaty collections containing relevant texts, official gazettes, and collected editions of national laws and regulations.

Among the international declarations of policy included in this volume are: the relevant parts of the Covenant of the League of Nations; the Constitution of the International Labour Office, with special reference to Article 41 which formulates methods and principles for regulating labour conditions in industrial communities; the Atlantic Charter and the Declaration of the United Nations thereon, as well as the Resolution of the International Labour Conference endorsed in the Charter; and the Final Act of the United Nations Conference on Food and Agriculture adopted at Hot Springs. Many texts in the volume relate to historical documents such as the Magna Carta, the Bull of King Andrew of Hungary of 1212, and the French Declaration of the Rights of Man of 1789. The work includes some Minorities Treaties, and documents concerning colonies, mandates and special territories (the Congo Acts, the Upper Silesian Convention, the Tangier Statute, and the Indian Status Declarations). Among other documents of interest included in the

book are proposals for amending the Constitution of Australia by the incorporation of a Bill of Rights, and the Declaration of Fundamental Rights adopted by the All Parties Conference in India in 1928.

It is stated in the Introduction to the volume that the value of declarations of social and economic policy is largely educative, and that they constitute a pledge that the policies of the State will be consistently directed towards the attainment of certain specified aims. Admittedly the force of public opinion is an essential factor in the achievement of any declaration, but it is doubtful, in view of the utter disregard manifested by many nations towards their constitutional declarations, whether a mere pledge on the part of the State is a sufficient guarantee of enforcement. Probably the enumeration of provisions in a constitution is of little value without the assurance of a definite procedure for their maintenance. Yet, as stated in the explanatory note, the principles which determine the implementation of the provisions enumerated in the volume are outside the scope of this significant compilation. Without underestimating the value of the present work, it is clear that a bare enumeration of provisions falls short of satisfying the requirements of the student seeking an adequate and comprehensive exposition of social and economic problems within countries in varying stages of constitutional and economic evolution. It is to be hoped that the International Labour Office may undertake some such study in the future. In the meantime those responsible for this volume must be congratulated on the production of the present work. Many constitutions will be drafted, and many more redrafted, during the post-war years. This volume will occupy an important position among the reference books of future draftsmen of these constitutions. It will also inspire research into a new aspect of comparative constitutional law. The book evinces the common ideals behind many of the constitutions of the world and raises indirectly the question whether an International Declaration of Social and Economic Policy may not form one of the essential parts of any future International Law.

K. Das.

The Headquarters of International Institutions. A Study of their Location and Status. By C. Wilfred Jenks. Royal Institute of International Affairs. London. 1945. 102 pp. (6s.)

There are few writers in the field of international law who combine, as Mr. Jenks does, an intimate practical knowledge of international institutions, a gift of precise legal analysis and a thoroughly progressive approach to problems of international organization. The present monograph, which is far from being a mere *livre de circonstance*, is a good example of that rare combination. It will remain a readable and useful contribution even after the headquarters of the various international organizations have been chosen and finally established. The first chapter of the monograph is devoted to a consideration of the question whether there ought to be a common headquarters for all (or most) international institutions or whether these should be widely distributed throughout the world. The author expresses himself decidedly in favour of the first alternative. He then surveys some of the more important factors to be taken into account in selecting a general headquarters. There follows a discussion of the requirements necessary to secure to the headquarters of international institutions a sufficient measure of independence of the territorial sovereign and of the manner in which these requirements can be met. The author goes beyond a consideration of the existing solutions and discusses in detail the more radical method of securing the independence of international headquarters, namely, the establishment of an internationalized headquarters governed by an international authority and not subject to the jurisdiction of any one State. In particular he considers in detail the possibility and the system of

government of an internationalized area, such as the State of the Vatican City, having the same status, immunities, and privileges as any other member of the international community.

The Royal Institute of International Affairs is to be congratulated on making possible the speedy publication of this timely monograph.

H. LAUTERPACHT.

Axis Rule in Occupied Europe. By Raphael Lemkin. Carnegie Endowment for International Peace. Washington, D.C. 1944. xxxviii+674 pp. ($7.50.)

Dicey once quoted (*Introduction to the Study of the Constitution*, 8th ed., p. 79) with approval the following words of Leslie Stephen: "If a legislature decided that all blue-eyed babies should be murdered the preservation of blue-eyed babies would be illegal; but legislators must go mad before they could pass such a law and subjects be idiotic before they could submit to it". Assuming the legislature to be the sovereign power of the State there are, according to this view, no limitations on that power except the threat of rebellion, the theory being that human reason would revolt against gross violations of justice and morality. In 1933 a government arose in Germany whose policy was directed not towards the murder of individuals only but of a whole civilization. The decrees of this government together with those of Fascist Italy and those of the puppet régimes of the Axis Powers, in relation to the various countries which they occupied, have been collected with great care by Dr. Lemkin and are on record for all time. The work has been splendidly done. Part I contains a general account of the main features of the German methods of administration in occupied territories. Part II analyses the régime applied in each occupied country. Part III contains the actual texts, done into English, of the decrees of the Axis Powers. The documentation and the Index are very thorough.

Dr. Lemkin makes in his preface a point which recurs from time to time in the rest of the book; and it is a point of some importance especially to students of jurisprudence. He says that "the German law imposed upon the occupied countries is bereft of moral content and of respect for human right". "It is not", he continues, "conceived as human justice but it invokes legal techniques simply as a means of administrative coercion" (Preface, p. x). This is an interesting restatement of the Austinian theory, and adherents of that theory would do well to ponder on its implications as shown in the text of this book, i.e. in the field of politics. The position of the German police in the Nazi scheme of things, the immunity of the Gestapo from all legal and judicial control, the introduction of the principle of analogy into criminal law, and the disregard of fundamental conceptions and institutions of law as known in Western Europe in modern times are very clearly described in Dr. Lemkin's chapter on Law. He sums it all up by saying: "German law is bereft of moral content and self limitations, being predominantly utilitarian. Law to the Germans is that which is useful to them" (p. 31). The insecurity of legal processes is illustrated in the author's chapter on the courts where he points out the lack of finality about their decisions which were subject to the intervention of the Reich Commissioner (a political officer) who could set them aside and order the courts to substitute his decisions for them. The organization of German military courts and German special tribunals in occupied territory is described in this chapter. As to local or national courts, those were either abolished completely or their jurisdiction was severely limited. The Supreme Courts of Poland, Austria and Luxembourg were abolished. Germans were immune from the jurisdiction of all local courts in these countries and German courts were set up in all occupied areas in order to exercise exterritorial jurisdiction over them. As to property, the

attitude of the German authorities varied in different countries, particularly as between Western and Eastern Europe. In some cases there was plain confiscation; in others "sequestration" was deemed sufficient and this more or less deprived the owner of the use or enjoyment of his property. The problem of title to property which passed under these decrees is discussed very fully by Dr. Lemkin. In the succeeding chapters he describes in detail the operation of Axis decrees in matters of finance, and the legal status of the Jews. Finally he comes to the most diabolical feature of the Nazi régime—what Dr. Lemkin calls "genocide", that is to say the systematic destruction of nations or ethnic groups. This was done by murdering leading personalities of the nations, by undermining the moral standards of the nation through systematic mental and physical debauchery, by removing all sources of cultural inspiration (libraries, works of art, etc.) which might remind the nation of its history, and by systematic impoverishment of the people and their standards of living as a whole.

The evidence provided by the texts of this legislation is more than enough to make it clear that international law, whether customary or conventional (as for instance expressed in the Hague Convention of 1907 regarding the laws and customs of war), had no meaning at all under the German occupation. Breaches of international law are so numerous that it is almost tedious to recite them. Disregard of family honour and rights and of the lives of persons and private property (Article 46 of the Hague Convention), pillage (forbidden by Article 47), collective fines (forbidden by Article 50, which was contravened by both Italy and Germany, especially in Russia and Eastern Europe)—all these, and many others, are proved to the hilt in black and white for the Axis Powers have provided official evidence by writing them into their laws, and have condemned themselves out of their own mouths. Professor Garner, in his two volumes *International Law and the World War* (1920), was obliged to search carefully for the evidence of breaches of the law of nations. The present volume provides evidence of such a kind that the reader can only say: *Res ipsa loquitur.*

There are many technical problems arising from the prolonged German occupation which are discussed by the author. And he makes practical suggestions with a view to dealing with them, in order that wrongs done may be redressed so far as possible, and that the normal processes and standards of law may be restored. This book is one which will be of enduring value to jurists, historians, students of politics, and practical men.

J. M. J.

International Transport and Communications. By Brigadier-General Sir Osborne Mance, K.B.E., C.B., C.M.G., D.S.O., assisted by J. E. Wheeler. Royal Institute of International Affairs. Oxford University Press.
International Telecommunications. 1943. (7*s.* 6*d.*)
International Air Transport. 1943. (7*s.* 6*d.*)
International River and Canal Transport. 1944. (10*s.* 6*d.*)

These are the first three sections of a general study of international transport and communications being prepared for Chatham House by Brigadier Mance; sections still to be published will cover rail and sea transport. It is intended at a later stage, when the tendencies of the post-war situation can be seen more clearly, to republish the work as a whole, incorporating any additions or amendments that may suggest themselves in the meantime.

There can be few people better suited to the task than Brigadier Mance; among other impressive qualifications he has been Director of Railways and Roads at the War Office, Transportation Adviser to the British delegation at Paris in 1919,

President of the Communications Section of the Supreme Economic Council in 1919–20, and a Technical Assessor to the Permanent Court of International Justice.

The scope of the work is described by the author in his general introduction: "The main questions to which the study will endeavour to provide an answer are: what are the principal solved and unsolved transport and communication problems of the last twenty years and what were the reasons for success or failure; in what direction can the solution of some of the more important unsolved problems be looked for; what international machinery exists for their solution, and what suggestions can be made for its improvement?" Although not primarily concerned with law, these studies will be invaluable to every international lawyer because, dealing with the whole subject comprehensively, they provide in a convenient form the historical and technical background necessary for an intelligent appreciation of the legal problems involved. They are well written, and well indexed. At the end of each section there is an excellent bibliography which appears under the modest title of "Note on Sources".

Some small improvements can be suggested for the final version. Treaties are the principal sources in all these studies, and it would therefore be useful if each had, in addition to the present note on sources, a table of treaties showing accessions and ratifications; for it is easy enough to find the text of a treaty, but it is often a troublesome matter to find out exactly which States are bound by it. In the section on air transport it would be particularly useful to have a list of the bilateral treaties on which, in spite of the existence of the better-known general conventions, international civil aviation still largely depends. The map illustrating the section on air transport is difficult to read, and it should be possible to find better conventional signs; besides, we are always taught nowadays that Mercator's projection is highly misleading for air routes.

Finally, it must be noted that, as the section on air transport was completed before the Chicago Conference on Civil Aviation, it has no reference to the five important instruments concluded there. This will no doubt be remedied in the final version.

R. Y. Jennings.

The Legal Aspect of Money. By Dr. F. A. Mann. London: Humphrey Milford, Oxford University Press. 1938. xxvii + 334 pp. (21*s.*)[1]

This is an erudite and scholarly treatise on a subject which has become one of great importance during the post-war period. The problems which arise in litigation affected by variations in value between the different currencies of the world are so complicated that without an understanding of the whole subject judicial decisions are not likely to be consistent. A comprehensive treatise will therefore be of great service—most of all to practititioners who have not only to advise their clients but to argue cases before the courts on these intricate and rather baffling questions.

The first part of Dr. Mann's volume deals with the legal problems of money in general. Few of us ever have to stop and think what money is. We have been accustomed to use it all our lives, and in England at any rate we have been spared the experience of violent fluctuations in the value of the wherewithal by which we buy our bread and butter; the result is that most of us have never had to reflect upon the subject. Without an understanding, however, of the functions which money fulfils and of the fact that money is merely a medium of exchange and not a commodity, it is difficult to cope with the problems connected with foreign money obligations, the subject to which the second part of the volume is devoted. For this part of the book, Dr. Mann takes an imaginary case, that of a promise made in

[1] See footnote on p. 303.

Vancouver by a business man of Montreal to pay to a San Francisco firm "100 dollars" in London. Round that hypothesis he builds up the material contained in the second part of his book; and it is this part of the work which is the more useful. Not until one studies these chapters does one realize the infinite variety of the problems which may, and do, present themselves in connexion with foreign money obligations; even what should seem to be the simplest proposition, that English money cannot in any circumstances be regarded in England as foreign money, can only be put forward with hesitation. There is an excellent chapter dealing with the determination of the money of account, as opposed to the money of payment, in cases both of fixed indebtedness and of claims for damages. Dr. Mann puts forward his suggestions for reconciling the decision of the House of Lords in the *Adelaide* case with that of the *Auckland* case in the Privy Council; and in a chapter on the nominalistic principle he deals with the construction and effect of the various forms of gold-clause which creditors—usually the party in the stronger position as compared with the debtor—have elaborated in order to protect themselves against loss due to currency fluctuations.

In the closing chapter, Dr. Mann deals with the problems which arise where the creditor is obliged to resort to legal proceedings in an English court to enforce a claim measured in foreign currency. The English rule that in an English court a claim must be made in English currency necessitates such a claim being converted into English money and the rate of exchange being thereby determined.

The preparation of this work must have entailed an immense amount of labour, but the labour will not have been wasted. The book will constitute a useful addition to the library of every practitioner accustomed to deal with commercial cases.

C.

International Law. Volume II. Disputes, War and Neutrality. By L. Oppenheim. Sixth Revised Edition edited by H. Lauterpacht. London: Longmans, Green and Co. 1944. xliv +766 pp. (50*s*.)

It is a particular pleasure to announce the appearance of a new edition of this important work, and both the editor and the publishers deserve congratulations and gratitude.

It is not a new edition in the strict sense of the word. The sixth edition, published in 1940, has been republished subject to a few revisions. Recent literature and decisions have been added, some recent events have been noted, and in two new sections Professor Lauterpacht has dealt with certain topics of particular significance. In the first of these sections he discusses the Surrender of War Criminals by the Defeated Belligerent and shortly indicates the views which he propounded at greater length in last year's volume of this Year Book (see "The Law of Nations and the Punishment of War Crimes," *British Year Book of International Law*, 1944, pp. 58 *et seq.*). The second new section deals with the modification of neutrality during the war. It will be of great interest to many readers. Professor Lauterpacht admits that the attitude adopted by the United States prior to December 1941 was not "consistent with the relevant specific rules of neutrality as they crystallized in the nineteenth century and in the Hague Conventions". "But", he says, "it is probable that these acts were in accordance with the law of neutrality viewed in its entirety and in its true historic perspective". He concludes that "that substantial aspect of the traditional law of neutrality which centres around the neutral rights of commerce and intercourse generally has become obsolete to a large extent".

For the rest the learned Editor has refrained from carrying out a thorough revision of the volume by taking account of the practice of belligerents in the

course of the Second World War and by eliminating large parts which in all probability are merely of historical interest. Professor Lauterpacht is very conscious of the great amount of work that will have to be done to bring the volume into line with the manifold changes which have occurred or are about to occur, but there will be general agreement with his view that the time has not yet come to undertake that task. Meanwhile this volume, brought up to date to such extent as is possible at present, will be welcomed by all international lawyers as the most modern treatise. It is assured of retaining and, indeed, strengthening the authoritative position which, by the common consent of students and practitioners, is accorded to it.

F. A. Mann.

The Conference of Ambassadors. Paris, 1920–1931. By Gerhard P. Pink. Issued by the Geneva Research Centre. 1942. 293 pp.[1]

This volume forms one of the Studies published by the Geneva Research Centre. It is a useful volume because by the exercise of diligent and patient research the author has collected so much material relating to the work achieved by the Conference of Ambassadors that it will mitigate to a very large extent the fact that the documents relating to the activities of that body have never been published. The world in general remains in ignorance of the origin of the Conference, of the objects with which it was set up, and of the work it accomplished.

Originally instituted, as may be deduced from the somewhat nebulous terms of the resolution of the Supreme Council, with the intention that it should supervise the execution of questions of detail arising under the Peace Treaties of 1919, the Conference was used by the principal Allied Governments for purposes which certainly transcended the original intention. The author is critical of the extent to which the Conference dealt with matters which certainly were not matters of detail in the execution of the Peace Treaties, but the reason is not far to seek. It was not the Conference which was going beyond the proper scope of its functions; it was the Governments represented in it which were directing their Ambassadors to do so; and these instructions were being sent because of the advantages which the use of this machinery presented for the discussion and settlement of the innumerable points that arose as a consequence of the 1919 settlement. The only practicable alternative was discussion in the Council of the League at Geneva, and the Conference of Ambassadors could work more quickly and more cheaply than Geneva and with the immeasurable advantage of avoiding intrusion by the Powers which were not directly concerned. No doubt publicity was avoided as well, but whether that was a good or a bad thing, it is as yet too early to say.

It is to be hoped that this volume will be studied by those who may be responsible for framing the peace settlement that must come after the present war. It is only by learning the lessons of experience that mistakes in the future settlement can be avoided.

There will be hard and unpalatable lessons to learn if a post-war machinery is to be set up which will function satisfactorily; unless a machinery can be found which will function satisfactorily there can be no hope of an enduring peace.

One of the most useful chapters in Mr. Pink's volume is that relating to the work of the Conference of Ambassadors in the supervision of the Military Control Commissions. The Atlantic Charter envisages something in the way of restricting the power of the enemy States to carry on aggressive warfare in the future. The intention was the same in 1919, but the expedients then adopted did not function successfully. Was the machinery itself bad? Or were there political circumstances and difficulties that the machinery was powerless to overcome? Every effort

[1] See footnote on p. 303.

should be made to study the task with which the Conference of Ambassadors was confronted and this volume affords a good opportunity of doing so.

C. J. B. Hurst.

La Réparation comme conséquence de l'acte illicite en Droit International. By Ladislas Reitzer. Paris: Sirey. 1938. 239 pp. (frs. 60.)

The author sets himself the task of studying the consequences of a violation of international law. For this purpose he includes not only legal consequences properly so called, i.e. the consequences which follow as part of a legal or arbitral decision, but also the consequences resulting from diplomatic or even military pressure. These latter consequences fall within the domain of the lawyer only if he adopts, as does the author of this careful study, a strictly positivist attitude, and finds in the power politics of sovereign States general principles of international practice which may form an international law. The author, as he says himself in his preface, is fully alive to the ethical weakness of the resulting construction; he warns his readers that "any evolution in this domain is incontestably conditional on a more efficacious organization of the international community".

And indeed the positive results of the author's methods are singularly meagre. Almost the only clearly established rule seems to be that before proceeding to reprisals of war the injured State must give the law-breaking State (and whether the law has been broken the State that claims to be injured alone decides) just an opportunity—which is not the same thing as a just opportunity—of remedying the alleged wrong. And, the opportunity once given, if advantage of it is not taken to the satisfaction of the claimant State, the door is open to any kind of violence and to the insistence by the claimant State on demands which have no connection with the original injury. Thus we get what some students may regard as a *reductio ad absurdum* of the author's principles that international law is based on treaties and custom only. On this shewing it is an error to regard the general principles of law recognized by civilized nations and "judicial decisions and the teaching of the most highly qualified publicists" as valid sources of that law. And yet the Permanent Court of International Justice is bound by its Statute to look in these directions for the law it has to apply. Can it be right thus to reject the doctrines which bind the only permanent International Tribunal of law which the human race has set up? International practice is law only when it has developed generally recognized customary rules; in so far as international practice merely exemplifies the unrestrained action of sovereign States seeking what their rulers believe to be advantages, that pactice is not regulated by accepted custom hardened or hardening into law. Such practices are of the domain of sovereignty not yet conquered by law. Where sovereignty is unrestrained law is absent; where law is present sovereignty is restrained.

It is remarkable that the author nowhere deals with the effect of the Pact of Paris (Briand-Kellogg Pact); it is assumed that a resort to war is as admissible at the present day as in past centuries as a sanction of an illicit action. But the Pact of Paris is a treaty binding practically the whole civilized world; it is not the less subsisting because it has been violated. The Covenant of the League, which is hardly mentioned by the author, may on his principles be set aside with better justification as it has not been accepted by the world as a whole and has now only a limited application.

The author discusses the consequences of illicit action according to diplomatic and judicial or arbitral precedents so fully that he leaves himself only a few pages for what he entitles a "digression on the character of international law". This

[1] See footnote on p. 303.

title is perhaps a little misleading as the question examined does not really extend to the nature of international law as a whole but only to the aspect of that law which the book discusses—namely, the question how far, when international law deals with a breach of its rules, it is to be regarded as a system of a penal or of a civil character. The author takes the view that, unless international law is in this matter to be regarded as something wholly *sui generis*, it resembles rather civil law. And here the reviewer ventures to range himself firmly with the author. As things are, in a society of equal states there does not exist that central and impartial authority which is an essential element in any system of penal jurisprudence. *Par in parem non habet imperium.* The book is a work of careful and praiseworthy research; its utility to the student and the practitioner would be greatly increased if it had been furnished with an index.

J. F. W.

Principes Généraux du Droit international public. By Charles Rousseau. Vol. I. Introduction. Sources. Paris: Pedone. 1944. xxxviii+975 pp.

This is the first, introductory, volume of what the author intends in due course to become a treatise of an imposing number of volumes. Professor Rousseau's scholarship, which ranges wide over both the literature of international law and the governmental and judicial practice, is well known to those acquainted with his previous work. It is therefore satisfying to learn that, while under German occupation, Professor Rousseau was able to complete this first instalment of what promises to be an important scientific undertaking. In substance, the volume is largely devoted to an exposition of the law of treaties. This covers nearly six hundred pages and constitutes a valuable contribution to the subject in all its aspects. The author pays special attention to the provisions of French law in the matter of conclusion, ratification, and enforcement of treaties. This part of the book fills a serious gap in the literature on the subject. But Professor Rousseau also deals with the subject from a comparative and doctrinal point of view, and it is probable that this part of the volume constitutes one of the most useful and instructive expositions of the law of treaties in the entire literature of international law. The last hundred and fifty pages of the book are devoted to a consideration of international custom, of general principles of law, and of equity. The volume includes also a full discussion of the theoretical aspects of the sources of international law, such as the place of natural law, the relative merits of the monistic and the dualistic doctrines, and the indebtedness of international law to public and private law.

The bibliographies, especially with regard to the French literature on the subject, are a model of completeness. There is a full index and a detailed Table of Contents covering thirty-five pages. All students of international law will wish Professor Rousseau God speed in his further labours and will look forward to a continuation of what promises to be one of the most comprehensive and valuable treatises of international law.

H. Lauterpacht.

Evidence before International Tribunals. By Durward V. Sandifer, Assistant to the Legal Adviser of the Department of State. Chicago: Foundation Press. 1939. xii+443 pp. ($10.)[1]

This volume originated in studies which the author found it necessary to make of the practice followed by international tribunals as regards the proof of matters on which such tribunals had to adjudicate in the light of evidence submitted by

[1] See footnote on p. 303.

the parties. Mr. Sandifer assisted Professor Hyde when the latter was counsel for Guatemala in its boundary dispute with Honduras, and it was then that the author discovered how difficult it was to ascertain what course had been most usually followed on any particular point.

The men who sit as umpires or arbitrators in international commissions or tribunals are more often than not trained lawyers, but they are drawn from different countries, and are men who have therefore been brought up under different legal systems. The principles governing the admissibility of evidence and the extent of proof required differ greatly in the various systems. Towards the close of his book the author shows how important it is that agreements for setting up claims commissions or similar tribunals between States should set out with reasonable detail the rules to govern the proceedings on such matters as the nature and extent of the evidence to be produced by the parties, the obligation imposed on the parties as to the production of relevant documents in their exclusive possession, the powers of the tribunal to require the production of evidence and to compel the attendance of witnesses, and the extent to which the rehearing of a case or the revision of an award may be asked for. Nevertheless, governments have been singularly lax as to including provisions on these matters when concluding agreements for setting up such tribunals. As often as not all matters of procedure are left to the discretion of the arbitrators. The wonder is that the tribunals have functioned as satisfactorily as they have done.

The book opens with an interesting chapter on the basic elements in the situation with which the author is dealing. Even if the purpose of evidence before a court must always be the same, viz., proof of a disputed fact to the satisfaction of the tribunal, the rules as to how that proof must be achieved have developed on different lines under the system in which it is the members of a jury who have to be convinced, as under the Angio-Saxon system, and under that in which it is the judge—in theory a trained lawyer—who has to be convinced, as in the Continental system. Before an international tribunal there is the possibility of the further complication that the agents and counsel on the two sides may have been trained in the two different schools with the further possibility that the umpire and the arbitrators may belong to neither.

This introductory chapter also stresses the fact that the purpose of all international legal proceedings is to get at the truth as to the facts in dispute. Disputes represent potential sources of friction between States and the object is to get the dispute settled on a basis acceptable to both parties: a settlement on the basis of facts is what is wanted, a decision turning on points of procedure. Other difficulties with which such international tribunals are confronted are due to the long delay that often elapses before the case reaches the tribunal, with the result that good evidence of the disputed facts is often most difficult to obtain; secondly, that there is no law of evidence enacted by a legislature binding upon the tribunal—nothing except what has been agreed upon between the parties in the instrument setting up the tribunal is directly binding upon the arbitrators, though indirectly a provision that the tribunal is to be guided by the rules of international law may oblige it to determine whether any and if so what rules may have passed so definitely into the practice of States as to have become a part of international law. Thirdly, there is the difficulty—on which perhaps the author does not lay sufficient stress—that, apart always from the Permanent Court of International Justice, whose published records are full and admirable, so few of the records of claims commissions and other international tribunals are readily accessible to the public.

In the main part of his book, Mr. Sandifer deals successively with all questions in connexion with evidence which may confront an international tribunal, such as the stage in the proceedings and the date at which written evidence must be filed and at which oral evidence, if any, is to be produced, the rights and obliga-

tions of governments concerning the production of documents in their possession, the admissibility of evidence, its form, whether written or oral, as also its authentication where it is written and its accuracy where it is submitted in the form of translation.

Similarly, there are special sections on the admissibility and value of maps, and on the categories of facts of which an international tribunal will take judicial notice without proof.

Chapters are also devoted to the rehearing of cases on account of newly discovered evidence or on proof of fraud, and on revision of decisions in pursuance of special provisions inserted in the instrument setting up the body giving the decision.

The number of persons actively concerned in the work of international tribunals —particularly in the United Kingdom—may be small, but to them this book will be very useful; it is clearly written, well arranged, and reflects an understanding spirit.

C. J. B. Hurst.

Handbuch des Internationalen Privatrechts, unter besonderer Berucksichtigung der Schweizerischen Gesetzgebung und Rechtsprechung. By Dr. Adolf F. Schnitzer. 2nd ed. 2 vols. *Verlag fuer Recht und Gesellschaft.* Basel. 1944. xvii + 773 pp.

The first edition of this book was published in 1937. The fact that after a few years a second edition was necessary testifies to its merits. It is, indeed, the first comprehensive treatise on Swiss Private International Law. However, the author does not confine himself to Swiss law but gives a comparative survey of the Private International Law of other countries, especially France, Germany and Italy. This renders his book especially valuable for those who during the war were shut off from contacts with the outside world.

The author's reason rejects the thesis preserving the application of the law of the country where the legal relationship, according to its characteristics, "has functionally its main task". It is not certain that this formulation is more helpful than "the proper law of the contract" which has given rise to so many controversies. For the real problem is to know which is the proper law of the contract or where exactly a legal relationship "has functionally its main task". When, to mention a case decided by the German Supreme Court, during the first World War an Austrian soldier in the Ukraine married there a Latvian woman, settled in Trieste, became an Italian citizen, emigrated to Germany and applied for annulment of his marriage—in which country had this marriage "functionally its main task"?

The book is of considerable practical value and can be recommended to every student of Private International Law.

E. F.

International Law. By Georg Schwarzenberger, Ph.D., Dr. Jur. In Three volumes. Vol. I. International Law as applied by International Courts and Tribunals. London: Stevens & Sons, Ltd. 1945. xliv + 645 pp. (£3)

This is the first of three volumes which are described on the cover of the first volume as "an attempt to build up a system of International Law in a way which is familiar to Anglo-Saxon lawyers from their own national systems of law, i.e. by the use of the inductive method". The second volume, which is in course of preparation, will be called "International Law as applied in British State Practice", and the third will present the judicial decisions of the English Courts and the other

Courts within the British Commonwealth and Empire in so far as those decisions touch upon questions of international law.

The scheme which Dr. Schwarzenberger has adopted resembles closely that of the *Fontes Juris Gentium* which followed a tripartite arrangement of material derived from the decisions of the Permanent Courts of Arbitration and International Justice, the Supreme Court of the German Reich, and the diplomatic correspondence of European States. Indeed, Dr. Schwarzenberger's first volume shows marks of indebtedness to Series A of that enterprise. It differs from it in some very important respects. In the first place, it is not, like the *Fontes Juris*, a source-book. Accordingly, he has not followed the practice of the editors of that work who wrote (Preface to the *Digest of the Decisions of the Permanent Court of International Justice*): "it appeared to us proper to reproduce only the texts without in any case attempting to formulate ourselves a single rule of law, corresponding to a legal conception of the Court derived from the combination of several passages". Secondly, Dr. Schwarzenberger has included not only references to the decisions of the "Permanent" Courts above-mentioned, but also to a large number of decisions by the Mixed Arbitral Tribunals, and a considerable number of cases decided by Claims Commissions and by Special Arbitral Tribunals. In all, about five hundred international cases are used in this volume. Thirdly, whilst Dr. Schwarzenberger admits that on some questions of international law international tribunals have had no opportunity of expressing an opinion, he submits that the three volumes taken together contain "a full exposition of International Law". The editors of the *Fontes Juris* made no such claim. The plan thus conceived by the author is on a grand scale; and it is a high tribute, both to him and his publishers, that he has successfully brought the first stage to its completion. The work as a whole has been admirably arranged and excellently produced. The Index, that happy hunting-ground for the reviewer, amply fulfils its functions, and for a work of this size and technical nature, all that skilful proof-reading and composition can do to make the book free from minor blemishes has clearly been done. We must welcome this new venture as an effort to bring international law, and the teaching of it, into closer touch with concreteness and the actual relations between States and governments. Broadly speaking it may be described as international law written from the cases, and there will be many who sympathise with Dr. Schwarzenberger's desire, especially as a teacher of the subject, to base his exposition on decisions instead of the opinions of writers. It will, indeed, be most instructive for those who imagine international law to be merely a speculative study, or a collection of pious hopes. Again, in certain particular fields, parts of this book serve admirably as the basis of the study of a special subject of international law. For instance, Dr. Schwarzenberger's Part VII, on "The Law of International Institutions", appears to the present reviewer to be a valuable section, complete in itself, which might well be used as the starting-point for advanced students, or as a general account of the subject suitable for men embarking on a diplomatic career. Indeed, this particular section is not likely to be affected by the succeeding two volumes, for the sources of law about it are necessarily international.

There is something exceedingly attractive about a book free from the burdensome and exhausting list of literature contained in orthodox text-books of international law. The reader is conscious, on the one hand, of a lucidity and freedom of exposition and, on the other, a practical satisfaction that he is not dealing with a subject which is entirely in the area of controversy. Dr. Schwarzenberger is probably right in thinking that this is a feature which will particularly appeal to "Anglo-Saxon lawyers". At the same time there is a danger that this method of treatment may defeat the purpose which he has in view. In the first place, the rest of the world has not the same reverence for judicial decision as ourselves, and

an English lawyer who is content to rely on this source alone in disputes involving international law may find he is leaning on a broken reed. Secondly, the "Anglo-Saxon" treatment of cases presupposes a hierarchy of courts, and appellate jurisdictions with final authority, under a unified system of governmental organization. Nor is it yet the time to say (as the author does) "Though International Law does not know of any principle of precedent in the strict sense of English law, these decisions" (i.e. of the World Court) "*necessarily*[1] carry greater weight than the views of any individual writer", for more than one opinion is frequently represented in these decisions. In fact, Dr. Schwarzenberger's view on this point is not in agreement with the practice of international and national tribunals—who constantly cite, and defer to, the opinions of writers. ("Last but not least", among the sources of international law, "opinions of jurisconsults or text-book writers" were enumerated by the Privy Council: *In Re Piracy Jure Gentium* [1934] A.C. 586. Both in that case and in *Chung Chi Cheung* v. *The King* [1939] A.C. 160 the Privy Council relied almost exclusively on the opinions of writers.) It is difficult, indeed, to see how otherwise international law can be developed. Dr. Schwarzenberger seems, however, to exalt the position of international tribunals to an extent not actually corresponding to international practice, and which they would certainly not claim for themselves. Such authority as their decisions possess is not the result of the fact that they *are* tribunals, but of the prestige of the jurists composing them. They are, in fact, rather in the position of jurists of the ancient world who were given the *ius respondendi*. It seems, therefore, misleading to distinguish international tribunals and writers as rigorously as Dr. Schwarzenberger does, or to depreciate the weight which should be attached to the opinions of the latter. Thirdly, although the novelty and value of the author's approach has already been stressed, it would be wrong to suppose that every rule which has been applied in practice is a rule of international law, and nothing which has not been so applied is law. The author does not go so far as this, but he certainly gives the impression that a wide gulf separates the views of writers and the views of courts. Dr. Schwarzenberger speaks of "an exposition of international law, not as seen by the writer of a text-book nor as alleged by contradictory State practice but as actually applied by international courts" (p. 4). Is it to be supposed, therefore, that international courts never contradict each other; and, if they do, what criterion exists to decide who is right? On the contrary, as Dr. Schwarzenberger rightly says (p. 4), he has taken pains to point out occasions when the decisions of international tribunals are contradictory. It is not the next two volumes which are to put right any errors committed by international tribunals; for the author states that "the views held by municipal courts and the treaties concluded by individual States cannot convey the same certainty of international law as may be claimed for principles accepted by the jurisprudence of international courts", and he observes that "these sources of international law" (i.e. the views held by municipal courts and the treaties) "prominently represent international law in the making". There is an air of unreality in all this, and we cannot help feeling that Dr. Schwarzenberger ignores, because he regrets, the non-existence in the international community of an authoritative system of judicature, legislature, and all the other organs of government which exist in developed systems of municipal law. From the standpoint of international law there is no ground for suggesting that the decisions of international tribunals are necessarily of greater authority, or binding force as precedent, than those of municipal courts. This is perhaps a pity, but nothing is gained by ignoring the fact. The decision of the English High Court on a point of international maritime law clearly "carries more weight" than that of a special arbitral tribunal composed of nationals of land-locked

[1] Reviewer's italics.

States (and that not only with English lawyers, as Westlake once pointed out). And yet, if we speak of "weight" in this connexion it can only be "weight" as regards judicial bodies or persons conversant with international law. We have already pointed out that judicial tribunals constantly defer to the opinions of writers. There remain, therefore, to be reckoned with, only writers whose business it is, not to create, but to ascertain and expound, rules of international law. The present reviewer is entirely in agreement with Dr. Schwarzenberger that the "subjective views" of such writers are not a satisfactory basis on which to build international law, but a comparison of Dr. Schwarzenberger's first volume with any orthodox text-book of international law shows little ground for suggesting that the views of writers are as "subjective" as he alleges, or are substantially different from those expressed in the decisions of international tribunals which he cites. For that matter, we cannot refrain from pointing out that many examples of "subjective views" expressed by the author can be found scattered throughout this book. He says that "natural law degenerated into an ideology of power politics" (p. 1), a statement which many will regard as superficial and untrue. He refers to "international morality, which in the sphere of inter-State relations is merely another name for natural law" (p. 14), an observation which is manifestly questionable. The "limitation of the term 'Tort' to the violation of the rules of international customary law" (p. 217) is not free from controversy. The opinion expressed by the author (at p. 458) regarding the League of Nations, that "in the end it proved to be an abysmal failure" is nothing if not subjective. The present reviewer neither attacks nor supports these views; he merely points out that Dr. Schwarzenberger has used freely the privilege of any writer on international law to express his opinions, not merely in the selection and interpretation of judgments (as the author does), but also in a more general field. There is altogether too much of the suggestion that the views of the author are "objective" whereas those of other writers are "subjective". This sort of logomachy is to be deplored. The work of the author must stand or fall as that of a "writer" on international law.

These criticisms which relate rather to technique, and to the fundamental attitude of the author to the sources of international law, in no way affect the value of the book as a whole. It is true, for reasons sufficiently explained by the author, that certain branches of "practical" international law in everyday use find no place in this volume, but these gaps may, to some extent, be filled by the next two volumes. It could be wished that references to the English renderings of the decisions of the Mixed Arbitral Tribunals in the *Annual Digest of Public International Law Cases* might have been given. Sometimes (e.g. at p. 256, where *Binon* v. *Germany and Others* (1922) is cited) these reports bring out points which the author fails to make. We note, with curiosity, that there is no mention of the important arbitration concerning *The Finnish Ships* (1934), and the reader may have cause to regret the absence of references to works on international case-law such as Freeman's *The International Responsibility of States for Denial of Justice* (1938) in connexion with the subject in hand. These omissions necessarily follow from the author's decision about the status of writers, and we cannot, therefore, do more than point out some of the regrettable results which follow from that decision.

J. M. J.

Soviets in the Arctic. By T. A. Taracouzio, Ph.D. New York: The Macmillan Co. 1938. xiv +563 pp. (32*s.* 6*d.*)[1]

Dr. Taracouzio presents in this work an exhaustive study of the achievements of the Soviet Government in the Arctic.

Little was done by the Czarist Government of Russia to administer, to civilize, or even to explore, the immense area which in the far north was indisputably subject to its sway. That era has passed away: Soviet Russia has become "north-minded": Government and people have taken up with enthusiasm the conquest of the ice-bound areas towards the Pole. Liberal appropriations of money have been made, and in the domains of scientific investigation, of economic organization and of technical installations for the improvement of navigation, the progress is remarkable.

The earlier chapters give a detailed account of the physical features of the area. Its size is immense, there are more than five million square kilometres of territory subject to the jurisdiction of the "Glavsevmorput", the organ of government brought into being in 1933 for the administration of all the Russian territory lying north of 62°N. The area contains the lower reaches of eleven great rivers, all flowing into the Arctic, including the Lena, one of the largest rivers in the world; and in this area are to be found sixty different nationalities speaking sixteen languages.

Communications and transport form, as might be expected, one of the most acute of the problems with which the Soviet Government has to cope. This explains the efforts which have been made to render the northern sea route practicable. Upon ease of transport depend the feeding of the inhabitants, the economic development of the area and the lessening of the cost of administration. The book gives also full information as to the economic possibilities and the mineral and natural resources of these Arctic areas.

Soviet Russia has adopted and applied by a decree of 1926 the sector theory. It claims as subject to Soviet sway—if not sovereignty—all the area in the triangle between the Pole and the meridians of the most northerly part of the boundary with Alaska on the east (i.e. 168°49′ 30″W.), and of that with Finland (32° 4′ 35″E.).

The sector theory is no new principle in international law; it was suggested in Canada as long ago as 1907 and has been the subject of considerable discussion in scientific journals. Excluding, however, the British Declarations of 1917 and 1923 relating to the Falkland Islands Sector and the Ross Sector in the Antarctic, the Soviet Government is the first to embody it in its national legislation. What the reaction on the part of other Powers to the Soviet decree may be there is at present nothing to show. If the question of sovereignty in the Arctic were the subject of discussion at an international conference, the Powers could not fail to take into account the dissimilarity between the physical conditions in the polar sphere and those obtaining in the areas where the rules as to territorial waters and high seas have developed. Account would have to be taken of the basic facts that ice is not water, and that much of the sea ice is not immobile. As regards coast ice—which is fixed and which projects at places to a great distance from the coast—there is not so much difficulty. The sea ice, however, moves, and at some speed. A very interesting chart in Dr. Taracouzio's book shows the drift of the Soviet Polar station between 21 May 1937, when it was established close to the North Pole, and 19 November 1938, when it was far down the eastern coast of Greenland. Dr. Taracouzio discusses the Soviet decree of 1926 and the sector theory in all its bearings. No attempt is made to hide the difficulties inherent in the application of the theory; in fact it may be thought that the author rather exaggerates them.

[1] See footnote on p. 303.

The book is full of information and contains (in English translations) the texts of most of the Soviet decrees affecting the administration of the northern area. There are also some useful maps and charts, as well as a full bibliography and a good index.

C.

The Czechoslovak Cause. By E. Táborský. London: H. F. & G. Witherby Ltd. 1944. ix+158 pp. (12*s.* 6*d.*)

Dr. Táborský has made an attempt, original in conception and execution, to examine the political status and the foreign relations of his country, Czechoslovakia, during the years 1938–44 in the light of international law. Dr. Táborský's task has not been easy. For the history of Czechoslovakia during the last seven years is full of incidents and situations which defy treatment according to the orthodox rules of international law. Consequently, the author has sometimes been forced to strain the meaning of the rules at his disposal or to apply well-established principles to novel situations for which they were not designed.

The book is divided into eight parts which deal successively with the Munich Agreement and the Vienna Award, the German-Hungarian invasion, the outbreak of war, the status of the Czechoslovak National Committee and of the Provisional Czecholovak Government before and after full recognition, Czechoslovak jurisdiction abroad, and preparations for peace and after. Each chapter consists of a succinct statement of the facts, followed by an examination of their relevance in international law. The author's approach is always interesting and his well-balanced conclusions, generally speaking, deserve full approval, but the following doubts may be noted:

On p. 13 it is stated that the Munich Agreement, not having been approved by the Czechoslovak Parliament, is not binding upon Czechoslovakia on the ground, *inter alia*, that the consent of Parliament for a cession of territory is a general principle of international law in the sense of Article 38 of the Statute of the Permanent Court. This raises the question whether general constitutional law has been recognized as yet as forming part of the general principles of international law. Even if the Munich Agreement should be contrary to Article 10 of the Covenant (pp. 16–17), it may be doubted whether it is consequently invalidated by Article 20 of the Covenant. It is also not quite clear how the Munich Agreement and the Vienna Award, after having been executed, could be destroyed by subsequent breaches of the agreement and of the award on the part of Germany and Hungary (pp. 21–22) or by the outbreak of war (p. 24), except that, as the British Government stated in 1940, the Allies may and intend to initiate new arrangements to take place when victory is achieved. The Slovak secession, brought about under compulsion, presents another difficult problem, for to apply the principles relating to treaties negotiated under personal duress (p. 35), when no treaty was actually concluded, means to extend rules of international law beyond their limits. The particularly vexed question of the transfer to the Bank of International Settlements of the Czechoslovak gold held by the Bank of England is handled with determination (p. 49), but the conclusion (p. 60) to the effect that the Bank of England, Great Britain and Switzerland have incurred international responsibility is open to serious criticism, as the author well recognizes. The attack on *Re Amand* (No. 2), [1942] 1 K.B. 445, is equally vigorous (pp. 111, 115), but insufficient attention is paid to the fact that the Court of Appeal, when examining the validity of the Dutch decree, was sitting as an English court applying foreign law in accordance with an English statute and that Dutch legislative and executive acts designed to take effect in England are distinct from those carried into effect abroad, which are alone covered by the rule in *Luther* v. *Sagor*, [1921]

3 K.B. 532, a rule which has already been stretched to its utmost limit. For an examination of this problem see Niboyet in *Revue de droit international et de législation comparée*, 3rd ser., vol. 9 (1928), pp. 753–812; Nussbaum, *Principles of Private International Law* (1943), p. 258, note 46. Dr. Táborský deprecates the restricted jurisdiction of the Czechoslovak military courts in England, but once these limitations as established by an agreement of 25 October 1940 and by the Allied Forces Act, 1940, are recognized as existing, it is difficult to follow the author's objections to the case of *Navratil* (p. 120) in the absence of details concerning the charge.

These criticisms do not detract from the value of this lively and scholarly book; rather they go to emphasize its wide range covering many aspects of international law.

K. Lipstein.

De la conclusion des traités internationaux. By Paul De Visscher. Brussels. 1943. 294 pp.

This book is described by its author as an "étude de Droit constitutionnel comparé et de Droit international". His object is to examine the manner of the exercise of the treaty-making power by a number of different countries, and in particular to ascertain the degree to which the executive authority and the legislative authority, in whole or in part, respectively exercise this power or participate in its exercise. The principal countries subjected to examination for this purpose are Great Britain, France, Japan, Germany, Belgium, Holland, Soviet Russia, Turkey and the United States of America.

It is particularly interesting to an English lawyer to read the results of M. De Visscher's examination of our law and practice in this matter, and to note how clearly he has grasped the difference that we make between the international validity of a treaty and the domestic power to apply and enforce it. There is a remarkable similarity between the Belgian and the British law and practice in this and in other matters. If the author's statement upon the other countries dealt with by him is as good as his statement upon Great Britain, he has written an excellent book. He examines a large number of national and international decisions and awards and the diplomatic practice relating to full powers and instruments of ratification, and he concludes with an exposition of the doctrine underlying the different national attitudes towards the competence of the treaty-making authority. I commend the book as an admirable example of the aid which the comparative method can bring to the elucidation of certain portions of international law. A portion which, like the exercise of the treaty-making power of States, involves also the constitutional law of States, is clearly likely to benefit from such treatment, but there are many other fields of international law in which this method can be pursued with advantage, as the work of the League of Nations Codification Commission well shews.

Arnold D. McNair.

Private International Law. By Martin Wolff. London: Humphrey Milford, Oxford University Press. 1945. xxxiv + 637 pp. (35*s*.)

The last ten years have witnessed a revival in the study of Private International Law, accompanied by the publication of a number of textbooks, both in England and America, distinguished by a high degree of scholarship. By selecting different methods of approach, textbook writers have bestowed upon their work the impress of their own personality, formed against the background of their own municipal law and of the history of their own system of conflict of laws, Dr. Wolff has brought to his task not only his extensive experience of English and Continental Private International Law, but also an unrivalled knowledge of foreign systems of private

law. This has enabled him to test the principles of English Private International Law against possible claims brought under foreign law, and to expose the gaps in the system hitherto unnoticed on account of the absence of decided cases.

When discussing theories advanced as a basis of Private International Law, the author rightly dismisses the doctrine of vested rights, but he fails to refer to the American branch of this doctrine which has found its strongest supporter in Beale and which combines the respect for acquired rights with an unqualified acceptance of the territoriality of laws, as developed by medieval writers. The doctrine of territoriality, and the problems arising out of it such as the question whether laws operate exterritorially, are of course only offshoots of the international school which during different periods has exercised its influence upon Private International Law in one of two directions. Universally, up to the time of Huber, and generally up to the nineteenth century, Conflict rules were derived from the nature of rules of substantive law, in which they were supposed to be inherent. Thus a rule affecting property was governed by the *lex rei sitae*, which was exclusive and territorial; if related to personal status, it was governed by the *lex domicilii*, which followed the person and was exterritorial. While the emphasis may have shifted at times from territoriality to exterritoriality, the principle remained undisputed, until modern codifications and Savigny's teachings rightly underlined the independent character of Private International Law and demonstrated that conflict rules are not to be derived uniformly from the nature of rules of private law. The influence of the medieval doctrine, however, which approached conflict rules from substantive law, has not entirely lost its grip even now, as is shown by Dr. Wolff's occasional references to the principle of territoriality (p. 536), his regard for the provisions of foreign law in the vexed question of *renvoi*, and his attempt to classify according to the *lex causae*. In the nineteenth century, the internationalist school sought, after its first defeat, to regain the lost ground by attempting to prove that Private International Law was a branch of Public International Law. So far as a claim for denial of justice may be brought for any acts on the part of a State which savour of illegal discrimination or of a violation of the minimum standards of justice, the contention of the internationalist school is correct, but it is a truism, and Dr. Wolff does not discuss it. He rejects the claim of the internationalists, but on the more limited grounds that Public International Law contains no rules on conflict of laws and that municipal rules of conflict of laws are unlikely to violate either the sovereignty and territorial integrity of other States, or the principles of equality and freedom of intercourse.

The second and more dangerous branch of the new internationalist doctrine, which seeks to attribute legislative competences on the basis of Public International Law, according to the principle of nationality and territoriality, is dismissed without further comment. Its most radical products, "the one-sided conflict rule" (referred to as "particular conflict rule" by Robertson, *Characterization in the Conflict of Laws* (1940), p. 99) and what has been called "the spatially conditioned internal rule" (see Nussbaum, *Private International Law* (1942), p. 70), are rejected as unjustifiable and as leading to an unreasonable extension of the *lex fori*, but a more detailed discussion would have been welcome. Such a discussion should have included s. 1(1) of the Inheritance (Family Provision) Act, 1938, as well as s. 1(1) of the Law Reform (Frustrated Contracts) Act, 1943, and the observations by Dr. Glanville Williams in his commentary on the Act (*Law Reform (Frustrated Contracts) Act*, 1943, p. 17). It could have dealt not only with the difficulties involved in the extension of a one-sided conflict rule to cover cases concerning persons other than those domiciled in England, but also with the dangerous modern tendency to treat the one-sided conflict rule not merely as part of the conflict rules of the *forum*, but as a tenet of International Law, with the result that nowadays, at times, foreign law is no longer applied because the

conflict rules of the *forum* demand it, but because foreign law is supposed to extend as of right into the domain of the *lex fori*. This is a return to the law before the time of Huber, a retrogression which has been justly criticized by Stone C.J. in a dissenting judgment (*U.S.* v. *Pink*, 315 U.S. 203, at p. 252) as leading to the absurd result that each country is in duty bound to apply any system of laws except its own, in defiance of its own conflict rules. Dr. Wolff's own position prevents him from getting caught in these pitfalls. He holds that "rules of private international law apply to certain given facts", and do not determine the legal system applicable to a given legal relationship. There will be general agreement with this concise statement (p. 4). The same applies to the emphatic dismissal of the approach from the substantive law (pp. 21, 24), the statement that connecting factors (points of contact) must be interpreted according to the *lex fori*, the denial that their interpretation raises a question of classification (p. 136), and the acknowledgment that the nature of conflict rules may result in the application of several systems of law in respect of the legal effects of a certain set of facts (this disposes of the scruples voiced by the advocates of secondary classification). A more detailed discussion of Pillet's doctrine and a few words on the theoretical basis of the American Restatement would have been welcome at the end of the Chapter entitled "Historical Survey".

We must now turn to individual problems. Dr. Wolff states (p. 56, n. 2) that corporations operated by a foreign State do not enjoy immunity from jurisdiction. This rule is subject to qualifications, see *Kunglig Jarnvagsstyrelsen* v. *Dexter and Carpenter*, 32 F. (2d) 195; certiorari denied 280 U.S. 579, 50 S.Ct. 32, 74 L.Ed. 629; *Miller* v. *Ferrocarril del Pacifico de Nicaragua* (1941), 137 Maine 251, 18 A. (2d) 688; *Annual Digest*, 1941–2, Case No. 51. On the other hand, contrary to the contention of the author (pp. 56, 58, n. 1), it is not certain whether immovables in England owned by a foreign State are exempt from local jurisdiction: see *Georgia* v. *Chattanooga*, 264 U.S. 472. The Brussels Convention of 10 April 1926, and the additional protocol of 24 May 1934, are not a dead letter (p. 57), but have been ratified by a number of countries and have been applied by the German Supreme Court (*The Visurgis and The Siena*, *Annual Digest*, 1938–40, Case No. 94); by the Court of Appeal of Brussels (*Saez Murua* v. *Pinillos and Garcia*, *ibid.*, Case No. 95); and by the Swedish Supreme Court (*The Rigmor*, *ibid.*, 1941–2, Case No. 63). The narrow Italian practice, which restricted diplomatic immunity to acts *jure imperii* (p. 57, n. 4), was reversed by a judgment of the United Sections of the Italian Court of Cassation: see *De Meeus* v. *Forzano*, *Annual Digest*, 1938–40, Case No. 164. The statement (p. 75, n. 1) that both in England and in the United States the courts of the domicile exercise jurisdiction in divorce might have been accompanied by a reference to the somewhat different concept of domicile in American law. This observation applies equally to occasional references to the Continental concept of domicile (pp. 121–2). The chapter on void and voidable marriages (pp. 78, 80, 120) deserves special mention for its convincing argument, based on historical grounds, that in present-day law the wife always acquires the husband's domicile, unless the marriage is "non-existent". Similarly, anticipating to a limited extent the developments during the last two years (*Easterbrook* v. *Easterbrook*, [1944] 1 *All E.R.* 90; *Hutter* v. *Hutter*, [1944] 2 *All E.R.* 368), Dr. Wolff argues (pp. 81–82) in favour of the jurisdiction both of the *forum domicilii* and of the *forum loci celebrationis* in respect of void and voidable marriages and restricts the operation of the rule in *Inverclyde* v. *Inverclyde*, [1931] p. 29, to cases based on grounds arising after the marriage, such as impotence and wilful refusal to consummate the marriage, but his attitude towards the two decisions quoted above is not quite clear and his reasons are not necessarily convincing.

In the section on Conflict Rules of International Tribunals various solutions are discussed, such as "the application of the systems of private international law pre-

vailing in the countries with which the case before them is connected", or "the law which would have been normally applied, had not an international treaty intervened". However, this section fails to take into account the fact that questions of a private law nature can also arise incidentally as preliminary questions in connexion with claims based upon the violation of Public International Law. The advantages and disadvantages of domicile and nationality are treated in detail, but, in keeping with tradition, no attempt is made to connect the adherence to the principle of nationality with the competence theory of the internationalists. Further, nationality differs from other legal tests, such as domicile, *locus contractus* or *solutionis*, inasmuch as the *lex causae* and not the *lex fori* must be consulted in the first place. This raises a preliminary question in the application of a conflict rule and leaves gaps where double nationality and statelessness are involved (pp. 102, 128). Dr. Wolff approves of *In re O'Keefe*, [1940] Ch. 124, without referring to Falconbridge's criticism in (1941) 19 *Can. Bar Rev.* 320, 323, based on De Nova, *Il Richiamo di Ordinamenti Plurilegislativi* (1940), to the effect that, in the absence of a uniform system of British law, Italian courts would have applied Italian law to the succession of a British subject domiciled in Italy. Dr. Wolff rightly points out that an apparent problem of classification may cover up a special English conflict rule, and quotes the treatment of limitation of actions in English Private International Law as an example. Adopting the view first expounded by Despagnet and rejected by the great majority of writers, Dr. Wolff insists that classification is determined by the *lex causae* (pp. 155, 156, 158).

This is not the place to examine once more the doctrine of classification, but it may be pointed out, first, that the author adopts, in this particular instance, the approach from the substantive law, which he rejects in another place, and secondly, that it is not always easy to discern the borderline between classification according to the *lex causae* and classification according to the *lex fori* following an analysis of the place and function of a rule of foreign law within the foreign system (see p. 157, sect. 146). Moreover, the rule of foreign law must be considered for the sole reason that the plaintiff has selected it as the basis of his claim in preference to that of any other system of laws which may be applicable, and not, as Dr. Wolff states, for "the adjustment of several internal legal systems working together in respect of the same set of facts" (p. 166).

The chapter on Public Policy is influenced by Savigny, but the doctrines of other writers are also mentioned briefly. No attempt is made, however, to examine them in detail and to set out the weighty objections which can be raised against each of them. Instead, the author has chosen the analytical approach, accompanied by interesting observations, since taken up by the courts (see *Srini Vasan* v. *Srini Vasan*, [1945] 2 *All E.R.* 21, (1945) 61 *T.L.R.* 415; *Baindail* v. *Baindail*, (1945) 61 *T.L.R.* 549) on the relative character of public policy (pp. 171, n. 4, 184, 324). The author accords a very wide field of operation to the doctrine of *renvoi*, which he treats as a technical problem after denying that he is adopting the approach from the substantive law. After stating that irrebuttable presumptions are of substantive character (p. 229, n. 2), the author suggests with some hesitation that s. 184 of the Law of Property Act, 1925, would be treated by English courts as procedural (p. 238, n. 3, 281). These doubts have since been dispelled by the decision in *In re Cohn*, [1945] Ch. 5.

The chapters on persons and corporations are particularly interesting, even if the reader may not agree with Dr. Wolff's criticism of the doctrine of incorporation. It may be doubted whether any test used for determining the status of a corporation in private law is also the appropriate test for ascertaining its nationality (pp. 311 *et seq.*), at least for the purpose of international claims. The case of *Mitford* v. *Mitford*, [1923] P. 130, is presented in a new light, but the categorical statement, in the same chapter (p. 331), that the *lex loci actus* is decisive where the consent of

third persons is required, must be qualified by a reference to *Salvesen* v. *Administrator of Austrian Property*, [1927] A.C. 641; *De Massa* v. *De Massa*, [1939] *All E.R.* 150; and *Galene* v. *Galene*, *ibid.*, p. 148. The decision in *Ogden* v. *Ogden*, [1907] P. 107, [1908] P. 46, is given a prominence which it no longer merits. Dr. Cheshire's doctrine that the law of the matrimonial domicil governs the capacity to conclude a marriage is rejected with forceful arguments. The statement that the diversity of castes, though an impediment in India, was disregarded in *Chetti* v. *Chetti*, [1909] P. 67, on the ground of public policy is not quite convincing, since the court assumed that the incapacity under Hindu law could be waived. The wording of the section on legitimacy (p. 390) suggests that in English law a father may bastardize his child at all times, but it would appear that Dr. Wolff wishes to refer only to cases where the legitimacy of a child is raised as an incidental question (divorce, incest, succession). *Shaw* v. *Gould* might be criticized on the ground, hitherto disregarded, that a preliminary question should be governed by the conflict rules of the law governing the main question, but is accepted by the author on the equally new ground that the Scottish divorce was contrary to English public policy. The defects of the restricted jurisdiction of English courts in bastardy proceedings are exposed, but it should be noted that an extension covering cases of bastardy arising under foreign law would confront courts of summary jurisdiction with serious difficulties.

The chapter on contracts deserves special mention for its excellence. A multitude of individual problems are discussed and the solutions, especially those regarding illegality and formalities, will generally be approved. Among those which are controversial the following may be mentioned: the question of what law must decide whether an offer is irrevocable, the effect of the death of offeror or offeree, mistake, fraud, misrepresentation and duress. *Lashley* v. *Hog* is treated as a case dealing with the law governing the matrimonial régime, but it would appear that the claim brought under Scottish law was one of succession. The section on changes in the obligation following a breach of contract is stimulating and includes a discussion of the right to claim interest and the defence of contributory negligence in the law of contract as recognized in Continental law, but this subject requires a further examination. The author rightly stresses that the proper law governs only the contractual aspects of a transaction and that the question of whether property has passed must be determined by different criteria (pp. 460, 463, 521, 525). Torts are given detailed treatment, on comparative lines, but an examination of Jessup's note (*The Law of Territorial Waters* (1927), p. 139 and note 3) that the rule in *The Halley* was developed in consequence of incorrect evidence regarding Belgian law, might have shed new light upon a vexed problem. *McMillan* v. *Canadian Northern Ry.* is interpreted as laying down not a new rule on torts but as developing an independent principle for workmen's compensation. The chapter on movables breaks new ground and should supersede all previous studies in this field. To criticize it would be petty, but in future editions the cases quoted at p. 530, note 1, might usefully be replaced by such decisions as *The Navemar*, 303 U.S. 68, and *The Kabalo*, 67 *Ll. L. Rep.* 572. The author follows the traditional doctrine with regard to confiscatory laws, but it is suggested that he has thereby conceded the approach from the substantive law, while the same result could have been reached by rigidly applying the *lex rei sitae*. It may be doubted whether the rule in *Luther* v. *Sagor* applies where the foreign State has passed laws of a confiscatory character, but has not taken any steps to implement them. Similarly, his qualified approval of the decision in *Lorentzen* v. *Lydden* will not be shared by all. The manifold problems arising in connexion with assignments are discussed with lucidity, but perhaps a reference to the brief observations in *Finska Angfartygs A/B* v. *Baring Bros.* (1937), 54 *T.L.R.* 147, would have been useful.

Dr. Wolff holds that the capacity to take under a will or an intestacy is governed by the law of the domicil of the deceased (p. 588), and distinguishes *Re Hellman's Will* and *Re Schnapper* on grounds which are subtle and convincing. Section 3 of Lord Kingsdown's Act is interpreted as including capacity to make a will. If this is correct, the author's conclusion that the section extends to aliens must also be approved. It is possible, however, that section 3 was drafted as an interpretative provision, amplifying sections 1 and 2 (see also Wolff, pp. 595, n. 5, 596, s. 562, 597). In this case, it could not exceed the boundaries established by these two sections. Unfortunately, the proceedings in Parliament throw little light upon the history of these sections and contemporary legal periodicals are equally of little assistance, as far as the reviewer is aware. Nevertheless, it is to be hoped that the history of Lord Kingsdown's Act will be studied, one day, in the light of contemporary legal and daily periodicals. *In re Priest*, [1944] Ch. 58, must now be read together with the observations of Dean Falconbridge in (1945) 18 *Can. Bar. Rev.* 516, at p. 518; and of Mr. Morris in (1945) 61 *Law Quarterly Review*, p. 124.

A special feature of this book is the great number of hitherto unnoticed problems which the author indicates and attempts to answer. The following may be mentioned: the domicile of an adopted child; change of domicile during infancy; nationality as a basis of jurisdiction for judgments *in personam*; set-off; the relation between burden of proof and substantive law; contribution between co-debtors; and the effect, in an action brought in England but based on foreign law, of the increased responsibility of the defendant accruing under foreign law. Further, the rights of a child *en ventre sa mère*, presumptions and declarations of death, incapacity to contract accompanied by different effects according as the *lex domicilii* and the *lex loci actus* is applied, directory prohibitions to marry, personal relationships between husband and wife, legitimacy of a posthumous child born after the widow has changed her domicile and of the issue of a foreign putative marriage, the rights and duties of parents towards their children, the recognition of foreign adoptions, and the relations between a mother and her illegitimate child. Others include: free choice of law and the effect of revolutionary and other changes in respect of the applicable law upon contracts, agency, subrogation and the right of recourse between several debtors, the *locus delicti commissi*, and easements.

The author and the publishers must be congratulated for having produced a book which is almost perfect, notwithstanding its comprehensive character and the difficulties of war-time. In a second edition it is suggested that the following errors, misprints or omissions may need rectifying. Page 43: the provisions on Private International Law in the Brazilian Code of 1916 were superseded by legislation of recent date which adopted the principle of domicile; p.45, n. 1: add Inheritance (Family Provision) Act, 1938, s. 1(1); Law Reform (Frustrated Contracts) Act, 1943, s. 1(1); p. 167, line 9: read 1939 instead of 1929; p. 349, n. 3: read 1938 instead of 1939; p. 451, line 16, and p. 453, n. 1, line 5: some passages have been omitted; p. 483, n. 1: read [1939] instead of [1929]; p. 484, line 13: two dates of publication are given in respect of the same book; p. 511, line 17: read 1811 instead of 1911; p. 527, line 11: read 60 *Rev. Ghent*, 1933, 468, instead of 60 *Rev. Darras*, 1933, 468.

However, these are trifling blemishes. It is clear that this book is, and will remain for a long time to come, one of the finest textbooks on Private International Law.

K. Lipstein.

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